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CASE NO. ____ OFFICE OF THE CLERK

In The
Supreme Court Of The United States
October Term, 1997

AMERICAN RELOCATION NETWORK INTERNATIONAL, INC.

Petitioner,

v.

WAL-MART STORES, INC., A. W. LLAMA CORP. AND AMERICA'S PARADE OF HOMES, INC.

Respondents.

On Petition for A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is procedural due process violated when the District Court and Sixth Circuit Court of Appeals in considering and reviewing a Motion for Summary Judgment, resolve disputed issues of fact, draw inferences of fact in favor of the moving party, and judge the credibility of witnesses?

II. Is procedural due process violated when the District Court and the Sixth Circuit Court of Appeals deny reasonable discovery requests based on the "admissibility standard" of Federal Rules of Evidence Rule 403, instead of the "likely to lead to the discovery of admissible evidence" standard of Federal Rule Civil Procedure 26(b)(1)?

III. Is procedural due process violated when the District Court and Sixth Circuit Court of Appeals in considering and reviewing a Motion for Summary Judgment fail to consider relevant undisputed facts of Record which support essential elements of plaintiff's claims?

IV: Does Rule 56 of the Federal Rules of Civil Procedure, as written, require that the parties should have an opportunity to be heard in open court before a dispositive motion is granted?

STATEMENT OF AFFILIATIONS

All parties are listed on the front cover. American Relocation Network International, Inc. has no parent company nor wholly-owned subsidiaries.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit was designated "not for publication" and has not been reported. It is reprinted in the separately bound Appendix at 1. The Sixth Circuit's Order denying petitioner's petition for rehearing and suggestion for rehearing en banc is not reported and is reprinted in the Appendix at 50.

The Judgment of the United States District Court for the Middle District of Tennessee has not been reported and is reprinted in the Appendix at 47, which affirms in its entirety the report and recommendation of the United States Magistrate Judge which is not reported and is reprinted in the Appendix, App. at 10.

JURISDICTION

On July 21, 1997, the Court of Appeals for the Sixth Circuit issued its Opinion affirming the District Court's grant of summary judgment to Respondents. App. at 1. The Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was denied by the Sixth Circuit on September 29, 1997. App. at 50.

The jurisdiction of this Court to review the Judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. § 1254(1) .

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The text of Rules 26(b)(1) and 56 of the Federal Rules of Civil Procedure; Federal Rules of Evidence 403; the text of the RICO Statute, 18 U.S.C. § 1961 et. seq.; and the 5th Amendment to the United States Constitution appears in the Appendix.

STATEMENT OF THE CASE

The original action was filed October 24, 1994 with an amended complaint filed December 19, 1994, asserting diversity of citizenship pursuant to 28 U.S.C. § 1331 and RICO jurisdiction pursuant to 18 U.S.C. § 1961 et. seq., respectively. Following discovery as allowed, the defendants filed a Motion for Summary Judgment. The trial court referred the matter to the Magistrate to render a report and recommendation.

On February 14, 1996, the Magistrate issued the report and recommendation which recommended plaintiff's case be dismissed for failure to show material issues of fact as to whether defendants used plaintiff's secret without authorization. App. at 29. Plaintiff and Defendants filed objections to the Report and Recommendation. Plaintiff objected that the Magistrate: a) made credibility determinations; b) drew factual inferences in favor of the non-moving party; and c) made the assumption that the

parties intended that all eleven causes of action be dismissed if the "trade secrets" cause of action was dismissed. Defendants objected that the Magistrate found it undisputed that a confidential relationship existed between the parties.[1] On March 21, 1996, the District Court in its Order affirmed the findings of the Magistrate and dismissed plaintiff's entire Complaint without a hearing. App. at 47. Plaintiff appealed. On July 21, 1997, in an unpublished decision, a three-judge panel of the Sixth Circuit affirmed. App. at 1.

The underlying facts in this case are partially set forth in the Sixth Circuit panel's opinion and may be briefly summarized. App. at 1. American Relocation Network International, Inc. (ARNI) is a Tennessee corporation whose majority stockholder and president is Theresa Inez Oldham. *Id. at* 2. In 1984, Ms. Oldham developed the idea to create a video real estate computer network that would advertise local, national and international real estate listings at any location supplied with a computerized unit. *Id. at 2.* In order to develop the

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[1]The Magistrate found a confidential relationship existed, (App. At 35) and as such the case should not have been dismissed under Tennessee law. A separate cause of action exists for breach of confidential relationship. See Edwards v. Travelers Insur. of Hartford, Conn., 563 F.2d 105 (6th Cir. 1977) citing Turner v. Leathers, 191 Tenn. 292, 232 S.W.2d 269, 271 (Tenn. 1950); Hall v. Britton, 292 S.W.2d 524 (Ct. App. Tenn. 1953) cert. denied (1954).

system, and to be financially successful, ARNI was required to seek out advanced computer technology capable of storing and transmitting quality images with sufficient speed, then display the images with textual information. This resulted in a "networked" system.[2] Aff. of Oldham, App. at 141. Ms. Oldham successfully located and secured the necessary technology to network a system in 1989; she then began efforts to generate business interest and financial support. In March 1990, she contacted Sam Walton, Chairman of Defendant Wal-Mart. She spoke confidentially with Becky Elliott, an assistant to Sam Walton, and forwarded to Elliott a booklet containing her confidential business plan. App. at 2.

In November 1990, Mrs. Oldham telephoned Elliott a second time and forwarded additional information to Elliott, including a prospectus. *Id. at* 2. At that time, Mrs. Oldham renewed the confidentiality agreement with Elliott.

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[2]Petitioner refers to a "networked" system hereafter. Petitioner's trade secret as "networked" would allow a buyer of real estate in one city to shop for real estate in the same city or another city, including viewing the house, its interior, exterior and factual (textual) data on the house, without ever leaving their home city. In 1991 and presently, the idea required significant computer storage capacity in order to display the quantity of pictures needed on a national or international basis. The technology required to make this "networking" successful was withheld from Wal-Mart and Llama during their contacts with ARNI.

Elliott referred Mrs. Oldham to Charles Rateliff, Treasurer of Wal-Mart. Rateliff was unavailable so Mrs. Oldham spoke with Terry Bertschy, Mr. Rateliff's assistant. *Id. at* 2. Mrs. Oldham sent Bertschy a confidentiality agreement by facsimile to which Bertschy agreed. *Id. at* 3. Thereafter, Mrs. Oldham forwarded her business plan and the prospectus to Rateliff. Sidney Thompson, Investment Banker of Llama Corporation, a Walton owned investment banking company, then contacted Plaintiff and invited the ARNI directors to Arkansas. *Id. at* 3.

A few days later on July 23, 1991, Ms. Oldham and ARNI representatives met with Sidney Thompson. *Id. at* 3. During the meeting, Thompson took extensive notes on ARNI's trade secret, business plan, income potential, prospectus, and part of the computer system including the method of operation. However, Ms. Oldham did not disclose the information about the specific technology required to construct the "network." *Id. at* 3. The next day, July 24, 1991, Sidney Thompson wrote ARNI indicating his need for further information to analyze the proposal. *Id. at 3.* In response, ARNI forwarded statistics and market penetration information. *Id. at* 3. Thompson then provided the Oldhams with the name and telephone number of Dean Sanders, Executive Vice-President of Operations at Wal-Mart. *Id. at* 3. Mrs. Oldham telephoned Sanders and talked with his assistant, Mary Moreland, on several

occasions in August and September 1991. *Id. at* 3. At Ms. Moreland's direction, the Oldhams forwarded the same information they had provided to Thompson at the July 23, 1991, meeting, including the market penetration numbers. *Id. at* 3. Again, Mrs. Oldham stressed the confidential nature of the documents. *Id. at 4*. After her conversation with Moreland, Mrs. Oldham had no further conversation with any representative of Wal-Mart or Llama, until October 5, 1991, when ARNI received Wal-Mart's letter indicating Wal-Mart was not interested in ARNI's idea as Wal-Mart did not intend to diversify into the real estate arena. *Id. at 4.*

During the same time frame that ARNI was working on its real estate network, Edwin Harwell (who was a high school classmate of Wal-Mart Treasurer Rateliff) alleges that he also developed an idea of automating real estate listings. *Id. at* 4. Harwell claims to have developed the idea in 1988, and to have contacted Rateliff in April 1991. Harwell alleges that Wal-Mart was interested in his idea at that time. *Id. at* 4. On July 23, 1991, Harwell and Wal-Mart allegedly entered into a contract allowing Harwell to test market his real estate idea in the Wal-Mart Stores *Id. at 4*. Harwell later denies the contract existed. *Id. at 4*.

On November 17, 1991, an organizational meeting of Harwell's company was held in Fayetteville, Arkansas,

which was later named America's Parade of Homes (hereafter "APH") *Id. at 4*. At that meeting Harwell stated he did not have a contract with Wal-Mart.[3] On November 19, 1991, APH (a Delaware corporation) registered with the Tennessee Secretary of State. App. at 224. On January 6, 1992, APH and Wal-Mart executed a contract in which APH was to lease space from Wal-Mart for APH operations. App. at 4.

The District Court and the Court of Appeals' findings of fact end there and do not include significant additional, undisputed facts of record which support plaintiff's claims. These include, *inter alia*, that one of the original founders of the predecessor of APH, along with Harwell, testified that Wal-Mart was not interested in the Harwell concept until one month prior to the November 1991 organizational meeting.[4] In December 1991, the Defendants created video promotions in which Defendants promoted a "networked" system similar to that which ARNI had proposed. Depo of Borengasser. App. at 124. These videotapes were advertised to the real estate industry

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[3]Attendee of the meeting, Erwin Davis, attorney from Fayetteville, AR, offered this testimony. Depo of Davis, App. at 106.

[4]Joe Bailey was financial support for Harwell while he developed his idea. Depo of Bailey, App. at 111-115.

and to the public at trade shows, after January 1992. Depo of Clyde Hyatt, App. at 227-231. That the videotapes were confusing because of the "tying the system together" segment. App. at 147. Defendants admitted through Joe Vaughn, President of APH, that they never successfully created the "networked" system which they were advertising and which was their goal. Depo of Joe Vaughn. App. at 131-132. Defendants eventually pulled the advertisements. The ARNI and APH systems, as developed, were substantially similar in the manner they were marketed and operated. Aff. of Ross Oldham, App. at 138.

When ARNI learned of the APH/Wal-Mart venture, Ms. Oldham contacted Llama's Sidney Thompson. Thompson told Ms. Oldham that Wal-Mart had "done this to them at least 15 other times." Depo of Theresa Oldham. App. at 210. This lawsuit then resulted.

REASONS FOR GRANTING THE WRIT

Equal Justice Under Law is denied when a District Court and Court of Appeals fail to follow and apply binding precedent and the Federal Rules of Civil Procedure in the manner provided for by this Court under the standards set forth in Celotex Corp. v. Catrett, 477 U.S. 317, (1986), Anderson v. Liberty Lobby, Inc., 477 U.S.

242, (1986) and Matsushita Elec. Industrial Co. V. Zenith Radio Corp., 475 U.S. 574, (1986). This Court's precedent and Rule 56 of the Federal Rules of Civil Procedure require the lower courts to consider the entire Record, to draw inferences of fact in favor of the non-moving party, not to make credibility determinations nor resolve disputed issues of fact. The lower courts in this case have violated these principles. The burden on non-movant when resisting a Motion for Summary Judgment requires that the Record contain more than a "mere scintilla" of evidence supporting their claims.[5] Petitioner's evidence overwhelmingly exceeds this standard. The lower courts' failure to observe this Court's precedent tarnishes the integrity of the federal judiciary. This Court should invoke its supervisory power and review the lower court's decision.

This Court has not yet determined the scope of discovery nor the standard to be applied in RICO actions, where the plaintiff serves as a "private attorney general."[6]

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[5]Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-52 (1986) Cf. Matsushita Elec. Industrial Co. V. Zenith Radio Corp., 475 U.S. 574, 587 (commenting that where a factual claim is implausible, (emphasis added) the non-moving party must come forward with more persuasive evidence than would otherwise be necessary.

[6]Sedima v. Imrex, 473 U.S. 479, (1985) held that civil RICO actions are "private attorney general" actions partly designed to fill prosecutorial gaps, and the RICO statute should be read broadly and "liberally construed to effectuate its remedial purposes."

The lower courts in this case applied the admissibility standard under Federal Rule of Evidence 403, while Petitioner contended that Federal Rules of Civil Procedure 26(b)(1), "the likely to lead to discovery of admissible evidence" standard, should be applied. The Court should take this case to define the scope of discovery in RICO actions and the standard to be applied by the lower courts when determining what discovery will be allowed.

The question of whether Federal Rules of Civil Procedure Rule 56 requires an in court hearing for an opportunity to be heard before a dispositive motion is granted has never been, but should be, decided by this Court.

I. Review Is Necessary To Determine Whether Petitioner's Procedural Due Process Rights Were Violated When The District Court And Sixth Circuit Court Of Appeals Judged The Credibility Of Witnesses And Drew Inferences Of Fact In Favor Of The Moving Party While Failing To Consider Inferences Of Fact In Favor Of The Non-Moving Party.

A. *The lower courts determined movants' affidavits credible in the face of evidence which questions the credibility of Affiants.*

The District Court and Sixth Circuit Court of Appeals must determine that the affiants' testimony supporting Defendants' Motion for Summary Judgment "that Wal-Mart did not use plaintiff's materials for any purpose"[7] was credible in order to sustain Defendants' Motion. There is evidence of Record which clouds the credibility of the Affiant's assertion and as such, the lower courts should have allowed the case to be heard by the trier of fact to determine the credibility of any assertions by those witnesses.

Affiants Harwell and Rateliff are the two individuals most knowledgeable about Wal-Mart and APH activities as they were the only individuals with contact between the two corporations.[8] They are the key individuals who affirm Wal-Mart and APH did not misappropriate plaintiff's trade secret.

Evidence of the lack of credibility of affiants' Rateliff and Harwell are that they allegedly signed a contract dated July 23, 1991. At the November 1991

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[7]Affidavit of Rateliff, App. at 144; and Affidavit of Harwell, App. at 163 are the two main characters who were involved; other individuals filed similar affidavits but their involvement in the information exchange is peripheral.

[8]Joe Bailey, original founder of APH testified "Ed handled all that" when referring to vendor contracts, etc. App. at 115-116.

organizational meeting of APH, Ed Harwell denied any contract existed with Wal-Mart. The authenticity of the July 23, 1991 contract is further questioned by Lela Ek, employee of Wal-Mart. She is responsible for creating these "vendor agreements" mirroring the above-described agreement, and Ek testified that the July 23, 1991 contract does not reflect the usual indications to show the document was created in the usual and ordinary course of business. She cannot explain why the July 23, 1991 contract does not have these indications.[9] These conflicts in testimony not only question the authenticity of the July 23, 1991 contract, but also question the credibility of the signatories to the contract when a signator denies its existence. This testimony also begs the question of whether the contract was created in an attempt to show APH contacts predated ARNI contacts.

An original founder of APH, Joe Bailey, testified that Wal-Mart was not interested in APH's project until October or November 1991 just prior to the November 17, 1991 APH organizational meeting. This testimony is inconsistent with the existence of a July 23, 1991 contract and inconsistent with Defendant's statement that Wal-Mart was working with APH as early as June 1991.

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[9]Depo of Ek, App. at 152-161.

The previous testimony is conflicting and material to the issue of misappropriation. Movants' affidavits are to be closely scrutinized, thus the District Court and Court of Appeals violated Petitioner's procedural due process rights when they accepted the affidavit testimony as true, with the evidence of the Affiants' credibility at issue.

The lower courts' opinions fail to address the credibility issue or Petitioner's contentions regarding the evidence and inferences to be drawn therefrom. As a result, Petitioner has not been advised by the lower Courts' opinion why their contentions regarding the evidence are legally insufficient. None of Petitioner's contentions regarding the evidence of misappropriation are addressed in the lower courts' opinions, and it is only remarked upon as being speculative evidence.

This case is deserving of the Court's attention in the exercise of its supervisory powers to protect the integrity of the federal judiciary. This issue presents the Court with the opportunity to strengthen its precedents regarding summary judgment and offer further guidance to the lower court in the proper application of this Court's precedent. This case also gives the Court an opportunity to instruct the judiciary on its responsibility in non-published decisions to fully address why a litigant's evidence is legally insufficient.

B. ***The Sixth Circuit drew inferences of fact in favor of the moving party.***

Rule 56 of the Federal Rules of Civil Procedure and this Court's precedent construing the rule clearly indicate that inferences of fact should be drawn in favor of the non-moving party.[10] The Circuit Court of Appeals drew inferences of fact in favor of the moving party, in clear violation of Rule 56 and this Court's precedent.

Petitioner received the October 5, 1991 letter from Wal-Mart which stated that "diversification is not the primary direction of the Executive Committee or Board of Directors." The testimony of an original partner in the unnamed partnership that was the forerunner of APH is that Wal-Mart did not become interested in the APH concept until late October or early November 1991. Wal-Mart contends through its Affiants that their project with APH began around June 1991 and allegedly signed a contract on July 23, 1991. Petitioner contended that this testimony is conflicting testimony which supports Petitioner's contention of a misappropriation and should have been resolved by the trier of fact.

Petitioner contended the October 5th letter may constitute a misrepresentation by Wal-Mart of their intent

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[10] Anderson, infra at 255.

toward ARNI's proposal.[11] In its non-published decision, the Sixth Circuit stated that defendant's "subsequent decision to invest in real estate does not render its earlier statement a misrepresentation."[12] This inference of fact was drawn in favor of the moving party by the Sixth Circuit and cannot be reconciled with this Court's precedent regarding the standards to be applied in deciding motions for summary judgment. If an inference can be drawn either way, this Court has held inferences should be drawn in favor of the non-moving party.[13]

The lower courts failed to address Plaintiff's contentions concerning inferences of fact to be drawn from the evidence. Plaintiff contended that many inferences of fact could lead a jury to reasonably conclude that a misappropriation took place. The Sixth Circuit's comments concerning Plaintiff's proof were "[a]ccording to the Defendants, the 'Record contains no contradictory

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[11]This difference in construing the evidence should have been resolved by the trier of fact, as it is material to the issue of Wal-Mart's intent. Intent is almost always a question for the trier of fact, Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[12]App. at 8.

[13]Celotex, infra; Anderson, infra; Matsushita, infra.

evidence'."[14] The failure of the lower courts to consider and address in their opinion Petitioner's contentions regarding the evidence violates procedural due process. Here it looks to Petitioner as if the Sixth Circuit only considered the Defendants' evidence and contentions.

Other facts Petitioner relied on to prove a misappropriation included this: between 1990 and 1991 ARNI proposed its business plan to Wal-Mart. During that time they were referred to various individuals within Wal-Mart and then to Sid Thompson of Llama, the Walton-owned investment banking firm. ARNI was turned down by way of the October 5, 1991 letter from Wal-Mart. During this time frame, Harwell alleges he (later APH) was marketing a similar idea to Rateliff, Vice-President of Wal-Mart. An original founder of APH testified that Wal-Mart was not interested, until late October or early November, in the APH project. Then November 17, 1991, the APH Corporation was formed. In December 1994, Wal-Mart and APH created videotapes marketing a "networked" system, which they admitted they never developed. Petitioner contended that many logical and reasonable inferences could be drawn from these undisputed facts. Inferences include that Wal-Mart considered the ARNI

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[14]App. at 6.

idea, then attempted to create the idea under the subterfuge known as APH. Another inference is that Wal-Mart misrepresented their lack of interest in the project to ARNI by the October 5, 1991 letter. These inferences are buttressed by the fact that Defendants, within one month of organizing, advertised the same "networked" system ARNI had proposed while attempts were being made to develop it. The inference of a misappropriation is logical and reasonable on the evidence. The Sixth Circuit held this quantum of circumstantial evidence to be speculative and not evidence from which a jury could reasonably conclude a misappropriation occurred. App. at 6. The facts concerning the marketing of the "networked" system defendants had not developed were not included by the lower courts in their opinions. Petitioner does not know whether the courts considered this evidence or any inferences to be drawn from it.

The difference between speculative evidence and evidence that would allow the trier of fact to "reasonably conclude" that an allegation is true is not well defined. The Court should take this opportunity to further define these terms to give the lower courts guidance on evaluating the sufficiency of evidence on a Motion for Summary Judgment.

Petitioner contend the lower courts' non-published opinion does not address all the facts and contentions

argued by the parties. As a result, Petitioner contends that its full and fair opportunity to be heard has been impaired. The Court could take this opportunity to instruct the lower courts on their role in assessing all the evidence of Record.

II. Review Is Necessary To Determine Whether Procedural Due Process Is Violated When The District Court And Sixth Circuit Court Of Appeals Deny Reasonable Discovery Requests Based On The "Admissibility Standard" Of Federal Rules Of Evidence Rule 403 Rather Than The "Likely To Lead To The Discovery Of Admissible Evidence" Standard Of Federal Rules Of Civil Procedure Rule 26(b)(1).

This Court has never ruled on the scope of discovery allowed a "private attorney general" under the RICO Act. The Act contains extensive discovery provisions which a government attorney is allowed in prosecuting a criminal RICO action.[15] This Court should take this case to decide the scope of discovery allowed under the civil portions of the RICO Act and determine whether the Federal Rules of Evidence 403 or Federal

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[15]18 U.S.C. § 1968, App. at 87.

Rules of Civil Procedure Rule 26 governs the discoverability of evidence.

The District Court applied the admissibility standard under Federal Rules of Evidence Rule 403 rather than the discovery standard of Rule 26(b)(1) of the Federal Rules of Civil Procedure when it denied Petitioner's request for the Defendant's fraud litigation history.[16] The standard used by the trial court was affirmed by the Sixth Circuit and creates erroneous precedent. Specifically the Court of Appeals stated "since the District Court determined the matters to be 'irrelevant,' the District Court did not abuse its discretion and was correct in denying the request." App. at 9.

Plaintiff's RICO claims require plaintiff to prove a pattern and practice of fraudulent conduct on the part of the defendant.[17] Plaintiff showed a similar act of fraud carried out in the same manner as in the case at bar in an unrelated action styled Creative Demo's v. Wal-Mart Stores[18]. The

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[16]Excerpt of Transcript of Hearing. App. at 51.

[17]18 USC § 1962 (1970).

[18]Creative Demo's. Inc. et al. v. Wal-Mart Stores, Inc., et al., U.S.D.C. Southern District of Indiana, Indianapolis Division Case # IP911256C, verdict and judgment for Plaintiff on fraud count, appealed to 8th Cir., Oral Argument held October 31, 1997, opinion pending.

"similar act" referenced involves the method used by the defendants in the case at bar to obtain another company's trade secrets. As other fraud claims are legally relevant to prove a pattern and practice,[19] plaintiff asserts that the Sixth Circuit should have reversed the District Court's decision. Discovery requests need to be relevant and "likely to lead to the discovery of admissible evidence" under FED. R. CIV. P. R. 26. Instead the lower courts erroneously determined that FED. R. EVID. R. 403 governed, and denied Plaintiff's request based on an erroneous determination Plaintiff was only entitled to discover relevant "admissible evidence."

The Sixth Circuit also held that Plaintiff showed no proof of its RICO claims. App. at 8. Plaintiff's efforts at this discovery were frustrated by the District Court's ruling on this issue because of its profound effect on Plaintiff's ability to produce additional evidence of a "pattern and practice" as required by the RICO Act. Plaintiff filed the locally required "RICO" Statement. App. at 167. This

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[19]H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed. 2d 195 (1989) held that the "relationship" element of a RICO pattern may consist of criminal acts that have the same or similar purposes, results, participants, victims or methods of commission...or a part of the regular way of doing business.

RICO statement shows that the evidence of Record could support RICO liability.

This Court has never ruled on the scope of discovery to be allowed in civil RICO actions. The Sixth Circuit affirmed the District Court on the admissibility standard, and has failed to follow their own established precedent.[20]

This Court should review the non-published decision in this case to ensure uniformity of decision in the Sixth Circuit. This Court should intervene as allowing this decision to stand sets a precedent and could lead to further erroneous rulings by District Courts in the Sixth Circuit based upon this precedent. This result is clearly contrary to Rule 26 and the liberal thrust of the Rules of Civil Procedure. Establishing that parties may only discover "admissible evidence" seriously threatens the current system of legal process firmly established in our Federal Courts.

III. Review Is Necessary To Determine Whether The District Court And The Sixth Circuit Court Of Appeals Violated Petitioner's Procedural Due Process Rights

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[20] Marshall v. Bramer, 828 F.2d 355, 357-58 (6th Cir. 1987) and Coleman v. American Red Cross, 23 F.3d 1091 (6th Cir. 1994) apply FED.R.CIV.P. 26.

When They Failed To Consider Relevant Facts Of Record Supporting The Essential Elements Of Plaintiff's Claims When Deciding and Reviewing A Motion for Summary Judgment

FED. R. CIV. P. 56 requires that the Court consider all material evidence of Record when ruling on a Motion for Summary Judgment. The lower court's failure to consider all the evidence of record is a denial of procedural due process, as the rules of procedure have not been equally applied to petitioner. If the same procedures are not applied in all cases, not only is the integrity of the federal judiciary compromised, but the procedural due process rights of petitioner are denied.

The Magistrate recommended dismissal of plaintiff's claims, holding that ARNI failed to produce any evidence of the "unauthorized use of the secret."[21] The District Court failed to consider circumstantial evidence of "unauthorized use," as did the Court of Appeals, when issuing their statement of facts. The Court did not comment on three categories of evidence which support the contention of unauthorized use. Those include: 1) undisputed evidence of the timing of the events; 2) undisputed evidence of the similarity of the ARNI and APH

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[21]Report and Recommendation of Magistrate; App. at 29.

product; and 3) undisputed evidence that Defendants marketed a "networked" system, but never successfully created one, as discussed previously.

Petitioner contended that these categories of evidence constitute more than a mere scintilla of circumstantial evidence from which a jury could reasonably conclude that Defendants misappropriated Plaintiff's trade secret. The Sixth Circuit held the evidence would only allow a jury to speculate such a finding. App. at 6.

The facts of the timing of events are undisputed, in that Wal-Mart, Llama and ARNI met during the summer of 1991. It is undisputed that Wal-Mart declined ARNI's project, stating that "diversification is not the primary direction the ...Board of Directors is taking at this time."[22] It is undisputed that Wal-Mart immediately thereafter pursued with APH a project similar to that proposed by ARNI.

The facts of similarity of product are undisputed. The two products were substantially similar in the manner in which they were designed, programmed, and the method the product operated.[23] The APH system was also

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[22]Letter dated October 5, 1991 from Wal-Mart to ARNI. App. at 142.

[23]Affidavit of Ross Oldham App. at 133.

marketed as proposed by ARNI. It is undisputed that the defendants displayed advertisements at trade shows and on television, indicating that Wal-Mart and APH had created a "networked" system. Phoenix TV station was instructed by APH by letter to stop using the video, because the "tying the system together' segment is misunderstood. App. at 143. The District Court and Court of Appeals failed to address any of these facts in their Opinions. Therefore, Petitioner contends the lower courts failed to consider these facts.[24]

An inference to be drawn from the evidence of timing and similarity of product is circumstantial evidence of Defendants' attempt to construct a "networked"system similar to ARNI's proposal. The evidence that Defendants marketed the "networked" system and never created one is, in Petitioner's view, compelling evidence of misappropriation. Petitioner's contend(ed) that a jury could

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[24] The Magistrate does refer to the timing of the events throughout the Report and Recommendation but attaches no significance to these facts. The Court of Appeals failed to consider the evidence entirely, as their statement of facts and opinions failed to include any reference to the evidence of timing or evidence of similarity. The Sixth Circuit also made no comment on Defendants' advertising of a "networked" system. The Court of Appeals stated "ARNI only offers indirect evidence from which a reasonable jury could only speculate and could not reasonably conclude that the defendants made unauthorized use of ARNI's secret." App. at.1.

reasonably conclude that a misappropriation occurred and find in ARNI's favor, rather than speculate as the Court of Appeals held.

The failure of the lower courts to consider all these facts violates the procedural due process rights of Petitioner. Further, these facts, if considered, make Petitioner's arguments concerning the facts plausible. This Court could take this opportunity to further define the duty of the courts to look to and comment on the entire record and contentions of the parties. This Court could also take this opportunity to further define its precedent on the minimum evidence required to overcome a Motion for Summary Judgment.

IV. Review Is Necessary To Determine Whether Rule 56 Of The Federal Rules Of Civil Procedure Require The Parties Should Have An In-Court Hearing On The Record Before A Dispositive Motion Is Granted.

This Court has never addressed the issue of whether FED. R. CIV. P. 56 requires the federal courts to grant an in-court hearing before a dispositive motion is granted.

There is a split in the Circuits as to whether a

hearing is required. The Fourth,[25] Fifth,[26] Sixth,[27] Seventh, ,[28] Eighth,[29] Ninth,[30] and Tenth Circuits[31] have held that no

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[25] United States Fidelity & Guaranty Co. v. Lawrenson, 334 F2d 464, 466-67 (4th Cir.), cert. Denied, 379 U.S. 869, 85 S.Ct. 141, 13 L.Ed.2d 71 (1964).

[26] Daniels v. Morris, 746 F.2d 271 40 Fed.R.Serv.2d 504, 20Ed. Law Rep. 1082 (5th Cir . (Texas) 1984)

[27] Dayco v. Goodyear Tire & Rubber Co., 523 F.2d 389 a(6th Cir. 1975)

[28] Sarelas v. Portikos, 320 F.2d 827 (7th Circ. 1963) cert. denied, 375 U.S. 985, 84 S.Ct. 519, 11 L.Ed. 2d 403 (1964).

[29] Parish v. Howard, 459 F.2d 616, 620 (8th Cir. 1972).

[30] Dredge Corp. V. Penny, 338 F.2d 456, 461-62 (9th Cir. 1964).

[31] Hazed v. Southern Hills Nat'l Bank, 414 F.2d 778, 780 (10th Cir. 1969).

hearing is required, while the Third Circuit[32] has held that a hearing should be granted.

Meanwhile, the plain language of Rule 56 contemplates that a litigant should be heard before a motion for summary judgment is granted, to wit; "the Motion shall be served at least ten (10) days before the time fixed for the hearing." (Emphasis added)

Rule 56(d) contemplates that "the Court at the hearing of the Motion by examining the pleadings and the evidence before it and by interrogating counsel...." (Emphasis added) FED. R. CIV. P. 56.

The plain language of these two sections of Rule 56 contemplates that a litigant could expect to be heard in Court on the Record on a Motion for Summary Judgment before it is granted. As a matter of course, the federal courts do not grant such a hearing in the Sixth Circuit. There is no clear authority from this Court setting forth whether a litigant is entitled to a hearing prior to a dispositive motion being granted.

Petitioner contends Rule 56(c) and (d) contemplate that the parties are to have a hearing and Rule 56(d) also contemplates that counsel shall have the opportunity to be

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[32] Season All Industries, Inc. v. Turkey sise VE Cam Farrikalari, 425 F.2d 34, 39 (3d, 1970).

"interrogated on the Record" and to, therefore, comment on the evidence and inferences to be drawn therefrom and to answer any of the Court's concerns and/or questions. The due process rights of litigants can be affected by the failure of a party to have the right to an in-court hearing on a dispositive motion prior to its being granted.

In this case assumptions were made by the Magistrate which resulted in all of Petitioner's claims being dismissed. The lack of mention of material facts in the courts' opinions in this case are indicative of the type of matters which can be overlooked on a stale record which can be brought to life for the Court in an oral argument. Reasonable inferences from facts can be discussed and the Court and litigants can understand on the record that the Court fully appreciates the parties' positions before a Summary Judgment is granted.

When courts issue opinions which do not include a fair discussion of all the issues and facts, a litigant questions whether he or she has had a full and fair opportunity to be heard, which may impair the integrity of the federal judiciary. Petitioner requests this Court to look to Rule 56 and determine whether a litigant should have the right to be heard in open court before a final dispositive Judgment is granted.

CONCLUSION

This Court should take this case to determine whether procedural due process is violated by the judiciary if this Court's precedent is not followed. Further, this case gives the Court the opportunity to expand its precedent to give the lower courts further guidance on the standards to be applied when evaluating the record on motion for summary judgment. This case also presents the opportunity to further define the minimum amount of evidence that must be of Record to overcome a Motion for Summary Judgment as mentioned in Matsushita, infra.

This Court should examine the discovery standards to be applied to the RICO Act and determine the scope of discovery allowed a "private attorney general" under the RICO Act. This Court should also look to FED. R. CIV. P. 56 and determine whether the parties should be granted an opportunity to be heard in open court, before a Motion for Summary Judgment is granted. The Court could take this opportunity to instruct the judiciary on their duty to litigants and the integrity of the federal judiciary to fully analyze the evidence in the Record and a party's contentions regarding that evidence in their non-published opinions.

Respectfully submitted this ___ day of December, 1997.

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CASE NO. _____

In The
Supreme Court Of The United States
October Term, 1997

AMERICAN RELOCATION NETWORK INTERNATIONAL, INC.

Petitioner,

v.

WAL-MART STORES, INC., A. W. LLAMA CORP. AND AMERICA'S PARADE OF HOMES, INC.

Respondents.

On Petition for A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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APPENDIX

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NOT RECOMMENDED FOR PUBLICATION

No. 96-5540

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN RELOCATION NETWORK INTERNATIONAL, INC.	§
Plaintiff-Appellant,	§ ON APPEAL FROM THE UNITED STATES
v.	§ DISTRICT COURT FOR THE
WAL-MART STORES, INC. A. W. LLAMA CORP. AMERICA'S PARADE OF HOMES, INC.	§ MIDDLE § DISTRICT OF § TENNESSEE
Defendants-Appellees.	§

BEFORE: **JONES, SUHRHEINRICH,** and **SILER.** Circuit Judges.

SILER, Circuit Judge. Plaintiff. American Relocation Network International, Inc. ("ARNI"), appeals the district court's grant of summary judgment to the defendants, Wal-

Mart Stores, Inc. ("Wal-Mart"), A.W. Llama Corp. ("Llama"), and America's Parade of Homes ("APH") (collectively, "defendants"), in this diversity action for misappropriation of trade secrets. For reasons stated herein, we affirm.

I.

At all times relevant to this appeal. Theresa Inez Oldham was the majority stockholder and president of ARNI, and Ross Oldham was the vice-president. In 1984, Ms. Oldham [1] developed an idea to create a video real estate computer system that would show local, national, and worldwide real estate. She contacted the office of Sam Walton, Chairman of the Board of Defendant Wal-Mart, in Bentonville, Arkansas in March 1990, in an attempt to gain interest and support for her idea. She spoke with Becky Elliot, an assistant to Walton, and subsequently forwarded to Elliot a booklet containing her business plan.

In November 1990, Ms. Oldham called Elliot for the second time and subsequently forwarded additional information to Elliott, including a prospectus. Also, Ms. Oldham "renewed" a confidentiality agreement with Elliot. Elliot then referred Ms. Oldham to Charles Rateliff, Treasurer of Wal-Mart, and Curtis Barlow, a Vice-President of Wal-Mart. Rateliff was unavailable, so Ms.

Oldham spoke to Terry Bertschy, Cash Manager for Wal-Mart. Ms. Oldham then sent Bertschy a confidentiality agreement by facsimile, to which Bertschy agreed. Thereafter, Ms. Oldham forwarded information about her business plans and the prospectus to Bertschy and Barlow.

On July 23, 1991, Mr. and Ms. Oldham met with Sydney Thompson, Vice-President of Llama, a Walton-owned investment banking group. During the meeting, Thompson took notes on ARNI's alleged trade secret, business plan, method of operation, income potential, prospectus, and computer system, although the Oldhams did not provide information about the specific technology and method required to transmit the computer images in a cost-effective manner. **[2]**

In August 1991, the Oldhams sent Thompson statistics and information regarding market penetration. Thompson provided the Oldhams with the name and telephone number of Dean Sanders, Executive Vice-President of Operations at Wal-Mart. Ms. Oldham called Sanders and talked to Mary Moreland, Sanders' Administrative Assistant, on several occasions in August and/or September 1991. The Oldhams then sent Moreland the same information that they had provided to Thompson

at the July 23, 1991 meeting. Ms. Oldham stressed to Moreland the confidential nature of the documents.

After the conversation with Moreland, Ms. Oldham had no further conversations with any representative of Wal-Mart or Llama. Ultimately, on October 14, 1991, Wal-Mart notified the Oldhams by letter that Wal-Mart was not interested in diversifying into the real estate arena and, thus, was no longer interested in their system.

During the time that ARNI was working on its real estate concept, Edwin Harwell, Chairman of the Board of Directors of APH, also developed an idea of automating real estate services. Based upon Wal-Mart's interest, APH continued to develop the system.

A contract, dated July 23, 1991, was executed by APH and Wal-Mart pursuant to an agreement to test-market the real estate system in Wal-Mart stores. On September 11, 1991, Wal-Mart stores were finally given authorization to accept Harwell's proposal. However, at a meeting in Fayetteville, Arkansas on November 17, 1991, APH admitted, through its directors and agents, that it did not yet have a final contract with Wal-Mart. Finally, on [3] January 6, 1992, APH and Wal-Mart executed a rental agreement in which APH was to lease space from Wal-

Mart for its operations.

ARNI filed the present action on October 24, 1994, against defendants, asserting that the defendants had misappropriated the plaintiff's trade secret and had thereby violated the Arkansas Uniform Trade Secrets Act., A.C.A. §§ 4-75-601 *et seq.*, the Tennessee Consumer Protection Act, and a Tennessee penal statute. The original complaint asserted numerous causes of action. However, the amended complaint merely asserted claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, and the state statutes referred to above.

II.

The district court found there was no genuine issue of material fact and granted summary judgment for defendants. This court reviews an order granting summary judgment de novo and, hence, uses the same test as used by the district court. *Harrow Prods., Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015, 1019 (6th Cir. 1995).

III.

A cause of action for misappropriation of a trade secret requires the following elements: "(1) the existence of a trade secret, (2) acquisition of the secret as a result of a

confidential relationship, and (3) unauthorized use of the secret." *E.W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1112 (8th Cir. 1969) (citing RESTATEMENT OF TORTS § 757(1939)). The district court found that "[a]lthough there may be genuine issues of material fact **[4]** that would preclude summary judgment as to the first two elements, [ARNI] fails to produce any evidence to support the third element."

ARNI "concede[s] that [it] ha[s] no direct evidence of any direct transfer of information." Yet, it argues that from the evidence in the record, read in the light most favorable to ARNI, a reasonable inference can be drawn by the trier of fact that the defendants used or disseminated ARNI's information. Defendants note that with their motion for summary judgment they filed affidavits from each of their agents identified by the Oldhams as persons with whom they spoke or to whom they provided information. All the affiants testified that they did not use ARNI's idea for any purpose. According to the defendants, the "record contains no contradictory evidence."

An examination of the record reveals that ARNI has not proven the district court's decision to be in error; rather, ARNI only offers indirect evidence from which a reasonable jury could only speculate and could not

reasonably conclude that the defendants made unauthorized use of ARNI's secret. Because ARNI offers no concrete evidence to overcome the motion for summary judgment, the district court's decision should be affirmed.

IV.

ARNI maintains that even if summary judgment was properly granted on the misappropriation of a trade secret claim, there were numerous other claims made by ARNI that [5] should not have been dismissed.[33]

While many of these claims were at one time made either in the original or the amended complaint, the Pre-Trial Order, which specifically states that it "supplants all previous pleadings filed in this cause," sets forth the issues and theories that were before the district court and are now

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[33]Specifically, ARNI lists the following issues: whether defendants used schemes and devices to defraud ARNI of its business concept (whether or not the concept is or was a trade secret); whether defendants converted the information which they obtained from plaintiff for their own use and benefit; whether defendants engage[d] in patterns of similar conduct to defraud businesses of their business concepts (RICO); whether the defendants breached an agreement and fiduciary obligation to keep the concept to themselves and not engage in unfair competition; and whether the defendants intentionally misrepresented to plaintiff that they were not interested in the concept.

before this court. ARNI's claims based on intentional misrepresentation, outrageous conduct, unfair competition, and breach of agreement and fiduciary obligation are not to be found in the pre-trial order and, thus, are not to be considered on appeal. Regardless, these claims are vague and meritless. Because the district court has found that ARNI could not present sufficient evidence of misappropriation to survive summary judgment, there has been no proof of outrageous conduct, unfair competition, or breach of any agreement or fiduciary obligation. Also, Wal-Mart's subsequent decision to invest in real estate does not render its earlier statement to ARNI a misrepresentation.

The claims properly before this court are equally without merit. Again, because ARNI could not prove misappropriation, it cannot prove a conversion or fraud. Furthermore, no proof is offered in support of ARNI's RICO claim. **[6]**

Finally, ARNI argues that because defendants only filed a motion for summary judgment on the misappropriation of trade secrets claims, a sufficient record has not been made regarding the other causes of action, and, thus, a remand is necessary to establish such a record.

However, it is clear that defendants moved for summary judgment, submitting that ARNI could not meet its burden of establishing that the defendants misappropriated a trade secret. Subsequently, the district court determined that ARNI's inability to survive summary judgment on this issue foreclosed all of ARNI's remaining claims. Accordingly, this district court committed no error.

V.

ARNI claims that the district court improperly precluded the discovery of defendants' previous litigation history. The scope of discovery encompasses any matter not privileged which is relevant to the subject matter involved in the pending action. *Marshall v. Bramer*, 828 F.2d 355, 357-58 (6th Cir. 1987). While the district court did allude to the fact that any such evidence would be inadmissable under Federal Rule of Evidence 403, it also stated that "we are simply not going to get bogged down in irrelevancies." Clearly, the district court found the previous litigation history to be irrelevant and, thus, did not abuse its discretion in denying the discovery request.

AFFIRMED. [7]

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

AMERICAN RELOCATION	**§**
NETWORK INTERNATIONAL, INC.	**§**
	§No. 3-94-0938
v.	**§**
	§
WAL-MART STORES, INC., et al.	**§**

TO: Honorable Thomas A. Higgins, District Judge

REPORT AND RECOMMENDATION

By order entered June 5, 1995 (Docket Entry No. 112), the Court referred to the Magistrate Judge the motion for summary judgment filed by defendants Wal-Mart Stores, Inc. and A. W. Llama Corporation (filed March 24, 1995, Docket Entry No. 40), pursuant to 28 U.S.C. § 636 (b)(1)(B), and the defendants' motion to exclude (filed May 30, 1995, Docket Entry No. 109) the plaintiff's response to

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(A) of FRCP on 2/14/96 by DM. Entry No. 195.

defendants' Rule 8 (b)(7)(c) statement, pursuant to 28 U.S.C. § 636 (b)(1)(A). The defendants' motion to exclude

has been granted by contemporaneously entered order. Also pending before the Court is the plaintiff's motion (filed August 1, 1995, Docket Entry No. 183) to supplement the record in response to the defendants' motion for summary judgment, which has been addressed in this Report and Recommendation. [1]

I. PROCEDURAL BACKGROUND

The plaintiff, American Relocation Network International, Inc., filed this action on October 24, 1994, against defendants Wal-Mart Stores, Inc. (hereinafter "Wal-Mart"), A.W. Llama Corp.[1] (hereinafter "Llama"); Walton Enterprises II Limited Partnership (hereinafter "Walton"); America's Parade of Homes (hereinafter "APH"), and McNaughton Enterprises, Inc. (hereinafter "McNaughton"), asserting that the defendants had misappropriated the plaintiff's trade secret and had thereby violated the Arkansas Uniform Trade Secrets Act, A.C.A. §§ 4-75-601 et seq., the Tennessee Consumer Protection Act, and a

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[1] Although the style of this case lists the defendant as "A.W. Llama Corp.," the defendant has been referred to as both A.W. Llama Corp." and Llama A.W. Corp."

Tennessee penal statute.[2] The plaintiff alleged diversity jurisdiction under 28 U.S.C. § 1332.[3]

On November 17, 1994, defendant Walton filed a motion to dismiss for lack of personal jurisdiction (Docket Entry No. 3). On the same date, defendant APH filed a motion to dismiss for lack of subject matter jurisdiction, alleging incomplete diversity among the parties (Docket Entry No. 7). Defendants Wal-Mart, Walton, and [2] Llama joined in that motion.[4] By order entered December

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[2] The plaintiffs cited T.C.A. § 39-3-1126, which has been repealed. T.C.A. § 39-14-138 now criminalized "theft of trade secrets."

[3] Actually, the plaintiff cited 28 U.S.C. § 1331 in its complaint, but it is clear that section 1332 was the intended jurisdictional basis.

[4] In the plaintiff's pretrial brief (Docket Entry No. 193), it asserts, however, that defendant Wal-Mart has stipulated to this Court's jurisdiction. Puzzlingly, the plaintiff devotes several pages of its pretrial brief to whether the Court has in personam jurisdiction over defendant Llama. Although defendant Llama joined in the motion to dismiss for lack of subject matter jurisdiction, i.e., diversity, it does not appear that defendant Llama has ever argued that it is not subject to the in personam jurisdiction of this Court. It may be that the plaintiff is asserting that the Court has subject matter diversity jurisdiction over defendant Llama because the Court has

22, 1994 (Docket Entry No. 19), the Court granted defendant Walton's motion to dismiss. By order entered January 6, 1995 (Docket Entry No. 20), the Court denied the motion of defendants APH, Wal-Mart, Walton, and Llama to dismiss because, in the interim, the plaintiff had filed an amended complaint (Docket Entry No. 17, filed December 19, 1994), alleging diversity jurisdiction,[5] reasserting the violations of state laws as claimed in the original complaint, and, in addition, asserting federal question jurisdiction based on alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 19 U.S.C. §§ 1961 et seq.

It appears that defendant Walton was dismissed for lack of personal jurisdiction pursuant to the December 22, 1994, order, and the denial of the motion as to Walton

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personal jurisdiction over defendant Llama pursuant to the Tennessee long-arm-statute. As perplexing as this position may be, the defendants have not raised the defenses of personal or subject matter jurisdiction in their pending motion for summary judgment and the matter does not appear to be otherwise relevant to the motion.

[5] In its pretrial brief, however, the plaintiff conceded that there is no diversity between the plaintiff and defendant APH.

based on subject matter jurisdiction was moot as to Walton since it had already been dismissed. By order entered July 6, 1995 (Docket Entry No. 134), [3] the Court granted the plaintiff's motion to voluntarily dismiss defendant McNaughton (Docket Entry No. 125).

Pursuant to the Court's order entered July 21, 1995 (Docket Entry No. 161), the plaintiff filed a RICO Statement on August 1, 1995 (Docket Entry No. 184). In that statement, the plaintiff lists the following predicate acts: (1) mail fraud as a result of the misappropriation of a trade secret after the telephone call from the plaintiff to Beck Elliott in March of 1990, when Ms. Elliott is alleged to have requested that the plaintiff mail a business plan to Sam Walton's office; (2) wire fraud as a result of the defendants' allegedly defrauding plaintiff of its trade secrets after a meeting between Mr. Thompson of Llama and the plaintiff's principals in July of 1991, arranged by telephone with the plaintiff; (3) mail fraud as a result of information allegedly fraudulently obtained by defendant Llama in July of 1991, by mailing a letter to the plaintiff seeking information in support of the plaintiff's prospectus; and (4) mail fraud as a result of the alleged fraudulent representation in October of 1991, when defendant Wal-Mart mailed to the plaintiff a letter, stating that Wal-Mart

was not interested in diversifying.[6]

The original complaint specifically asserted "common law fraud, negligence; conspiracy to commit fraud; misappropriation of trade secrets; outrageous conduct; breach of confidential [4] relationship; breach of express contract; breach of implied contract; intentional misrepresentation; and conversion of property and [violation of] plaintiff's right to maintain a common law copyright and unfair competition." Docket Entry No. 1, at ¶ 38. However, the amended complaint (Docket Entry No. 17) does not set forth these causes of action in the same manner, and, instead specifically asserts claims under RICO and the state statutes referred to above. It is not clear whether the plaintiff intended to maintain in the amended complaint separate causes of action for the state law claims previously asserted. In the amended complaint, the plaintiff separately refers to the alleged misappropriation form of the plaintiff's trade secret (¶¶ 31, 33-34), and to "fraudulent and tortuous conduct and [conspiracy] with the intent to misappropriate the [plaintiff's] trade secrets" (¶ 34), but it appears that these allegations of misappropriation

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[6] In its amended complaint, the plaintiff refers to seven predicate acts (Docket Entry No. 17, at ¶ 14), but the Court has synopsized the description of the predicate acts listed in the plaintiff's RICO statement.

for the basis of the asserted violations of the Arkansas Uniform Trade Secrets Act, the Tennessee Consumer Protection Act, and RICO. In addition, the plaintiff appears to separately assert a cause of action for breach of confidential relationship (¶¶ 37, 39), breach of express or implied contract (¶ 41), and conversion (¶ 41).[7] **[5]**

At the hearing before the Honorable Thomas A. Higgins on July 20, 1995, the plaintiff's counsel represented that he was proceeding on the following theories: (1) RICO; (2) breach of contract, specifically, breach of the confidentiality agreement; (3) misappropriation of trade secrets, specifically, the

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[7] The confusion in this regard emanates from the fact that the paragraph in the original complaint (Docket Entry No. 1, ¶ 38) that includes the laundry list of state claims is deleted from the amended complaint (Docket Entry No. 17).

Despite the fact that the plaintiff spends several pages discussing what appears as a separate cause of action in its pretrial brief, see Docket Entry No. 193, at 21-29, and the fact that the plaintiff refers in the amended complaint to "fraudulent" conduct of the defendants, it does not appear that the plaintiff has set forth fraud and/or constructive fraud as a separate cause of action apart from the alleged misappropriation of a trade secret and apart from the RICO claim.

plaintiff's concept of listing real estate in the manner set forth in the plaintiff's business plan; (4) conversion of business property, specifically the plaintiff's business plan; (5) fraud; and (6) constructive fraud. Docket Entry No. 167, at 53-58.[8] However, in its pretrial brief (Docket Entry no. 193), the plaintiff asserts only the following state claims: (1)misappropriation of trade secrets, governed by Tennessee and/or Arkansas statutes; (2) fraud and constructive fraud; and (3) conversion.

Defendants Wal-Mart and Llama moved for summary judgment on the grounds that there are no genuine issues of material facts upon which the plaintiff can support a claim of misappropriation of a trade secret. Therefore, the defendants argue, that they did not violate the Arkansas Uniform Trade Secrets Act, the Tennessee Consumer Protection Act, the Tennessee penal statute,[9] or

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[8] The defendants apparently accept the plaintiff's theories as counsel stated on July 20, 1995. See defendants' brief on the applicable choice of law, Docket Entry No. 174.

[9] The defendants also argued that the plaintiff has not specified how the defendants are alleged to have violated the Tennessee Consumer Protection Act and that the Tennessee penal statute is inapplicable to the facts of this case.

the [6] Racketeer Influenced and Corrupt Organizations Act.[10] The defendants did not specifically address any other, potentially asserted causes of action. In its response (Docket Entry No. 103) to the defendants' motion, the plaintiff states that the "main factual disputes that require trial are" whether the plaintiff's concept was a trade secret, whether there was a confidential relationship between the plaintiff and the defendants, and whether the defendants breached a confidential relationship and converted plaintiff's trade secret, the elements of misappropriation of a trade secret. In its response, the plaintiff also briefly discussed it position as to the defendants' violation of the Arkansas Uniform Trade Secrets act, the Tennessee penal statute, the Tennessee Consumer Protection Act, and

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[10] Rather than challenging the basis for the plaintiff's federal question subject matter jurisdiction, i.e., RICO, head on, and then subsequently arguing, if successful on the defense to the RICO claim, that the state causes of action would then fail for lack of diversity jurisdiction, as the defendants had previously argued in their motion to dismiss, the defendants argued that if there were no misappropriation of a trade secret under state law, then the RICO claim would fail.

RICO,[11] but did not mention any other potential state causes of action. It is apparent [7] that the parties agree that, if the Court finds that there are no genuine issues of material fact and that, as a matter of law, there was no misappropriation of a trade secret, all claims, including both the RICO claim and state law claims, will be dismissed. It is, therefore, in that vein that the Court has analyzed this case.

II. PLAINTIFF'S MOTION TO SUPPLEMENT

By motion filed August 1, 1995 (Docket Entry No. 183), the plaintiff seeks to supplement the record to include

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[11] In its pretrial brief, the plaintiff gives short shrift to its RICO claim by stating "Plaintiff has heretofore filed a RICO Statement in accordance with the Court's order and further discussion would be duplicative." Docket Entry No. 193, at 30-31. The plaintiff gives only slightly more consideration to the RICO claim in its response to the motion for summary judgment by stating that it intends to show "that the documents requested by Defendants were requested over the telephone lines and that the information was forwarded through the United States mail." Docket Entry No. 103 at 8. It appears to the Court that RICO has provided no more to the plaintiff than a jurisdictional foot in the door and that the gravamen of the plaintiff's claim has been all along, and continues to be, a state cause of action for misappropriation of a trade secret.

a copy of the complaint and verdict in the case of Creative Demos, Inc. v. Wal-Mart Stores, Inc., No. IP 91-1256-C (S.D. Ind.), which, the plaintiff asserts in its motion, shows a previous pattern of conduct on the part of the defendants. The defendants responded by objecting to such supplementation (Docket Entry No. 191), because the cited case is inapposite under Sixth Circuit case law and because the Court, by order entered July 21, 1995 (Docket Entry No. 166), has already ruled that information about other lawsuits involving defendant Wal-Mart is not discoverable[12] and, since it is not discoverable, it should not be considered by the Court in ruling on the motion for summary judgment.

In response to the Court's order directing the plaintiff to file a RICO statement, the plaintiff cited the Creative Demos case in support of the plaintiff's assertion that the predicate acts formed a pattern of racketeering activity (Docket Entry No. 184, at **[8]** ¶ 5(f)), and attached

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[12] It appears that the Court denied the motion to compel such discovery for failure to comply with Local Rule 9(e). See Docket Entry No. 167, at 6-8; Docket Entry No. 151, which denies the plaintiff's motion to compel defendant Wal-Mart (Docket Entry No. 86), which, by a process of elimination, may be the motion seeking information about prior litigation.

to the RICO statement a copy of the same complaint and verdict with which the plaintiff seeks, by its motion, to supplement the record. By attaching these documents to its RICO statement, they are in the record. The plaintiff has not argued the significance of the Creative Demos verdict, nor has it sought to amend its Rule 8 (b) (7) statement of additional facts or its response to the motion for summary judgment to further explicate on the issue. Although the plaintiff's motion to supplement is not technically part of the Court's referral to the undersigned, the Magistrate Judge recommends that the motion be granted inasmuch as it is already before the Court as an exhibit to the plaintiff's RICO statement. The Magistrate Judge has reviewed these documents in the consideration of the defendant's motion for summary judgment, but does not find that they change the recommendation contained herein on the pivotal issue of whether or not there was a misappropriation of a trade secret.

III. FACTUAL BACKGROUND[13]

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[13] These facts have been gathered from the documents submitted by both parties in support of and in opposition to the pending motion, see Docket Entry Nos. 40-45, 47-49, 67-70, 103-104, 110, 131, and 136, and, in particular, from the facts conceded by the parties in their Local Rule 8 (b) (7) statements to be undisputed for the purposes of this motion, see Docket Entry Nos. 44, 104, 110. The facts set forth herein are, unless otherwise

Theresa Inez Oldham is the majority stockholder and president of American Relocation Network International, Inc. (hereinafter "ARNI"). Ross Oldham is the vice-president or ARNI. In 1984, Ms. Oldham developed an idea to create a video real estate computer [9] system that would show local, national, and worldwide real estate. Ms. Oldham's basic concept was a still video imaging screen that would allow computer access to information about real estate on the market and to related services without requiring potential buyers to travel to the properties with realtors.

Sometime after 1984, Ms. Oldham began to research the technology that would be needed to implement her idea. Ms. Oldham called the office of Sam Walton, Chairman of the Board of defendant Wal-Mart, in Bentonville, Arkansas in March of 1990, and spoke with Becky Elliot, and assistant to Mr. Walton. As a result of that conversation, Ms. Oldham forwarded to Ms. Elliott a booklet containing her business plan. Ms. Oldham did not communicate with anyone at Wal-Mart again until

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specified, undisputed by the parties or undisputed for purposes of the defendants' motion for summary judgment.

November of 1990.[14]

In November of 1990, Ms. Oldham called Ms. Elliott for the second time. As a result of that phone call, she forwarded additional information to Ms. Elliott, including a prospectus. Ms. Oldham "renewed"[15] a confidentiality agreement at that time. Ms. **[10]** Elliott referred Ms. Oldham to Charles Rateliff, Treasurer of Wal-Mart, and Curtis Barlow, a Vice-President of Wal-Mart. Ms. Elliott transferred Ms. Oldham's call to Mr. Rateliff, but he

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[14] In September of 1990, Ms. Oldham entered into a contract with a company called Electro Communications Systems, Inc. (ECS) to obtain the equipment necessary for her system. Theresa Oldham Deposition, at 139 (Docket Entry No. 40, Exhibit 1).

[15] The defendants do not dispute that a confidentially agreement was "renewed," as alleged by Theresa Oldham in her affidavit. See Docket Entry No. 110, at ¶ 5. There is no specific mention in the record of the existence of a confidentiality agreement entered into during Ms. Oldham's first conversation with Ms. Elliott in march of 1990. Although, in the amended complaint, the plaintiff states that Ms. Oldham "inform[ed] [Ms. Elliott] of the confidentiality of ARNI's plans" during the March and November 1990, telephone conversations, Docket Entry No. 17 at ¶ 18; see also Docket Entry No. 110, at ¶30, it is not clear whether such confidentiality agreements were in writing or were oral, see Docket Entry No. 167, at 26-28.

was unavailable, so Ms. Oldham talked to Terri Bertschy, Cash Manager of Wal-Mart. Ms. Oldham then sent Ms. Bertschy a confidentiality agreement by facsimile, to which Ms. Bertschy agreed. Thereafter, Ms. Oldham forwarded information about her business plans and the prospectus to Ms. Bertschy and Mr. Barlow.

On July 23, 1991, Mr. and Ms. Oldham met with Sydney Thompson, Vice-President of Llama, a Walton-owned investment banking group. The meeting lasted approximately two hours, during which Mr. Thompson took notes on the plaintiff's trade secret, business plan, method of operation, income potential, prospectus, and computer system, although the Oldhams did not provide information about the specific technology and method needed to transmit the computer images in a cost-effective manner.[16]

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[16] The plaintiff states that "this cost effective transmission of images is a method of programming the software and the only method known to plaintiffs or that has been patented to date that can cost effectively transmit images such that an economic gain could be realized on a state, nationwide or worldwide basis to transfer images." Docket Entry No. 104 at ¶ 8, citing Affidavit of Ross Oldham. The defendants respond that similar systems have been patented. Docket Entry No. 110, at ¶ 8, citing Affidavit of Nicholas Alter.

In August of 1991, the Oldhams sent Mr. Thompson statistics and information regarding market penetration. Mr. Thompson provided the Oldhams with the name and telephone number of Dean Sanders, Executive Vice-President of Operations at Wal-Mart. Ms. Oldham called Mr. Sanders and talked to Mary Moreland, Mr. Sanders' [11] Administrative Assistant, on several occasions in August and/or September 1991. The Oldhams then sent Ms. Moreland the same information that they had provided to Mr. Thompson at the July 23, 1991 meeting. Ms. Oldham stressed to Ms. Moreland the confidential nature of the documents.

After the conversations with Ms. Moreland, Ms. Oldham had no further telephone conversations with any representative of Wal-Mart or Llama, although she did send to and receive some correspondence from Wal-Mart and Llama thereafter. On October 14, 1991, Wal-Mart notified the Oldhams by letter that Wal-Mart was not interested in diversifying into the real estate area.[17]

During the time that the plaintiff was working on its real estate concept, Edwin Harwell, Chairman of the Board of Directors of American Parade of Homes (hereinafter

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[17] It is undisputed that Wal-Mart had not previously offered any real estate services to its customers.

"APH"), also developed an idea of automating real estate services.[18] Mr. Harwell's initial **[12]** dealings with Wal-Mart were through Charles Rateliff, a former high school classmate.[19] Based on Wal-Mart's interest in Mr. Harwell's

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[18] The plaintiff disputes that Mr. Harwell developed such an idea. However, in its Rule 8 (b) (7) response, the plaintiff cites no authority for its disputation, as required by Local Rule 8 (b) (7) (c). Docket Entry No. 110, at ¶ 14. The plaintiff does set forth as additional facts that Mr. Harwell only had a three-page business plan which did not have any "software, computer program, method to carry out his 'business idea'; prospectus, business name, or any other indicia of a credible business plan." Id. For this proposition, the plaintiff cited pages 9-10 of the deposition of David Graham. The defendants are correct. Mr. Graham's deposition testimony was simply that Mr. Harwell's proposal was "[j]ust a plain piece of paper." Graham's testimony in no way supports the plaintiff's statement that Mr. Harwell did not have software, hardware, a prospectus, etc. In its motion to supplement (Docket Entry No. 131), the plaintiff cites to additional pages of the Graham deposition. However, the additional testimony provides no further support to dispute the defendants' assertion.

[19] The Plaintiff stated in its statement of additional facts that "Ed Harwell allegedly contacted somebody with Wal-Mart who he had gone through high school with at Hope, Arkansas and that this was Charles Rateliff. . . . That only Charles Rateliff and Ed Harwell and any contact

system, APH proceeded to develop the system. APH is a corporation independent of Wal-Mart and Llama and was incorporated by Mr. Harwell, Jim McDonough, and Joe Vaughn.

A contract, dated July 23, 1991, was executed by APH and Wal-Mart, pursuant to an agreement to test-market the real estate system in Wal-Mart stores. On September 11, 1991, Wal-Mart stores were finally given authorization to accept Mr. Harwell's proposal. However, at an "invitation only" meeting in Fayetteville, Arkansas on November 17, 1991, APH admitted, though its directors and agents, that it did not yet have a final contract with Wal-Mart.[20] Finally, on January 6, 1992, APH and Wal-Mart executed a rental agreement in which APH was to lease space from Wal-Mart for its operations. Docket Entry

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during the initial phase of the development of the APH Corporation, idea, and business plan until APH Corporation was begun in November 1991." (Docket Entry Nos. 104 and 110, at ¶ 44). It is not clear what the plaintiff is implying with these statements, but there is nothing in the record that suggests that Mr. Harwell and Mr. Rateliff had had any ongoing relationship since high school (or, for that matter, during high school).

[20] The APH real estate selection centers were, however, in operation in some Wal-Mart stores since the fall of 1991. See affidavit of David Graham, Docket Entry No. 68, at ¶ 8.

No. 40, Exhibit 13. [13]

IV. SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56 (c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." In order to prevail on a motion for summary judgment, the moving party must demonstrate that no genuine issue of material fact exists and that judgment as a matter of law should be granted in the moving party's favor. Smith v. Hudson, 600 F.2d 60 (6th cir. 1979).

In considering a motion for summary judgment, the court must view all facts and inferences to be drawn therefrom in the light most favorable to the non-moving party. SEC v. Blavin, 760 F.2d 706 (6th Cir. 1985). The non-moving party, however, may not merely rest on conclusory allegations contained in the complaint, but must respond with affirmative evidence supporting its claims and establishing the existence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Cloverdale Equipment Co. v. Simon Aerials, Inc., 869 F.2d 934, 937 (6th Cir. 1989).

Not every factual dispute between the parties will prevent summary judgment. The disputed facts must be

material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The dispute must also be genuine. **[14]** The facts must be such that if they were proven at trial a reasonable jury could return a verdict for the non-moving party. Id., at 248. The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-89 (1968).

V. ANALYSIS AND CONCLUSIONS

A cause of action for misappropriation of a trade secret requires the following elements: "(1) existence of a trade secret, (2) acquisition of the secret as a result of a confidential relationship, and (3) unauthorized use of the secret." E. W. Bliss Co. v. Struthers-Dunn, Inc., 408 F.2d 1108, 1112 (8th Cir. 1969) (citing Restatement of Torst § 757 (1939)). Although there may be genuine issues of material fact that would preclude summary judgments to the first two elements, the plaintiff fails to produce any evidence to support the third element. Therefore, Wal-Mart and Llama cannot be found liable on ARNI's claim for misappropriation of a trade secret.

A. Whether ARNI's Concept Is a Trade Secret

The plaintiff relies upon the definition of "trade secret" as provided in Arkansas Code Annotated § 4-75-601(4), as follows: "information, including a formula, pattern, compilation, program, device, method, technique or process that: (A) derives independent [15] economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." The defendants, however, contend that both Arkansas law and Tennessee law support their position that the plaintiff's concept was not a trade secret.

The defendants cite Coenco, Inc. v. Coenco Sales, Inc., 940 F.2d 1176 (8th Cir. 1991), in which the court applied the Arkansas trade secrets law to allegations that an employee had appropriated a trade secret. The Eighth Circuit Court of Appeals held that what was appropriated was not a trade secret because "its components, together or single, are either generally known by virtue of extant patents or readily ascertainable by proper means (such as reverse engineering or simple observation) contrary to the requirement of subparagraph (A) [of the trade secrets statute]." Coenco, 940 F.2d at 1179. The Court elaborated in a footnote that "it is axiomatic that a thing patented cannot also remain a secret." Id., at n.3.

The defendants contend that Tennessee case law also supports their position on the issue of secrecy. In Hickory Specialties, Inc. v. B & L Laboratories, Inc., 592 S.W.2d 583, 587 (Tenn. Ct. App. 1979) (citing Allis-Chalmers Mfg. Co. v. Continental Aviation & Engineering Corp., 255 F. Supp. 645, 653 (E.D. Mich. 1966)), the Tennessee Court of Appeals held that "the subject matter of a trade secret must be secret. Matters of public knowledge or general knowledge in the industry, or ideas which are well known or easily ascertainable, cannot be trade secrets." **[16]**

The plaintiff argues that a determination of whether information is a trade secret is an issue of fact and depends upon the intent of the owner and treatment of the information by the owner. Laser Industries, Ltd. v. Eder Instrument Co., Inc., 573 F. Supp. 987, 991 (N.D. Ill. 1983). Since it had the intent to keep its information secret and took extensive steps to protect its concept, the plaintiff contends that it possessed a trade secret. However, the court in Laser Industries held that there are other factors that must be considered in determining the existence of a trade secret, including "the extent to which the trade secret information is known outside the business."[21] Id.

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[21] Other factors to consider are "security measures taken by the owner, the value of the trade secret information to the owner and to his competitor, and the

However, since this case has no precedential value in the Sixth or Eighth Circuits, the court will adopt the defendants' analysis of the law regarding the determination of a trade secret.

The plaintiff further insists that, based on American Can Co. v. Mansukhani, 7238 F. 2d 818 (7th cir. 1982), if a trade secret is discovered pursuant to a confidential relationship, then liability may be found, even though someone else might have discovered the secret by fair means. Again, this holding lacks precedential value in the Sixth and Eighth Circuits. However, this case, like other trade secret cases, holds that the mere existence of a trade secret and a confidential relationship does not suffice [17] to impose liability. An actual misappropriation of the trade secret must take place. See discussion, infra, at 21-27.

The defendants assert that the plaintiff cannot prove that its trade secret was in fact a secret since the idea and technology had already been developed and patented by third parties and, therefore, the idea and technology were public knowledge or at least easily ascertainable. In his affidavit, Nicholas Alter, President and Chief Executive Officer of Boris Systems, Inc., stated that Boris Systems

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amount of effort or money expended in developing the trade secret information." Laser Industries, 573 F. Supp. at 991. The court emphasized that a "trade secret must be a secret in fact." Id.

acquired a patent on March 29, 1988 (a copy of which is attached to the affidavit as Exhibit A), for a system "designed to be used in the sale of the real estate by allowing potential customers in one city or location to view pictures of property in other cities or locations," and that the system "uses highly technical cameras and video equipment in addition to computers and technology to transfer video images from one location to another within seconds." Docket Entry No. 48, at ¶ 2. According to Mr. Alter, work on the Boris system began in late 1983. The defendants have also proffered patents of two other similar systems invented by Leender M. Bijnagte, for which application was originally made in 1987 and 1988, respectively, long before the plaintiff met with representatives of Wal-Mart and Llama in 1991.[22] Docket Entry No. 48, Exhibits C and D. **[18]** The Defendants argue that, because the same idea had been patented and made public by 1988, under both Arkansas and Tennessee law, the plaintiff's idea was not a trade secret.

Furthermore, in his affidavit, Edwin Harwell stated

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[22] Although applications for these patents were filed as early as 1987 and 1988, both patents were abandoned and later refiled on August 15, 1990, and September 1991, respectively. The patents on these applications were not granted until September 8, 1992, and August 10, 1993, respectively. Docket Entry No. 48, Exhibits C and D.

that he developed the concept for the APH system in 1988, "independent of Wal-Mart or any of the defendants or plaintiff [and that the] concept presently being used in the Wal-Mart stores was developed prior to meeting with any representative of Wal-Mart or any of the defendants." Docket Entry No. 40, Exhibit A, at ¶ 2.

The plaintiff argues that Terry Muncey, Chairman and CEO of Electro Communications Systems, Inc., and Theresa Oldham have indicated in their affidavits (Docket Entry Nos. 102, 106) that the Boris and Bijnagte patents are no the same as ARNI's concept, and, even if an idea similar to ARNI's had been patented prior to ARNI's meeting with Wal-Mart, it had no economic value. The plaintiff asserts that the idea only became profitable through ARNI's technology and expertise. Furthermore, the plaintiff contends that the subject matter of its trade secret was not within public or general knowledge in the industry, nor was it well known or easily ascertainable in 1991. The plaintiff does not cite to the specific portions of the Muncey and Oldham affidavits that support its argument, but the affidavits do suggest that Mr. Muncey and Ms. Oldham found problems with the patents that might affect profitability. Whether their conclusions are correct is questionable. However, their opinions raise a genuine issue of **[19]** material fact on the issue of whether the ARNI concept was a trade secret.

B. Acquisition of Secret through Confidential Relationship

The plaintiff contends that the issue of whether a confidential relationship existed between the plaintiff and the defendants is an element of its misappropriation claim.[23] See E. W. Bliss, supra. The Court agrees.

The plaintiff asserts that a confidential relationship existed between the plaintiff and defendants Wal-Mart and Llama. Ms. Oldham conscientiously apprized representatives of the defendants, with whom she conferred, of the importance of confidentiality. When Ms. Oldham talked to Ms. Elliott in November of 1990, she forwarded additional information to her, including a prospectus, and renewed[24] a confidentiality agreement. In her affidavit, Ms. Oldham related that she forwarded information about her business plans and a prospectus to Ms. Bertschy and sent her a confidentiality agreement, to which Ms. Bertschy agreed. When Ms. Oldham sent Ms. Moreland information about the ARNI system, Ms. Oldham stressed to Ms. Moreland the confidential nature of

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[23] In their memorandum (Docket Entry No. 43) in support of their motion for summary judgment, the defendants do not specifically include this element as a necessary element for a misappropriation claim, but they do not expressly disagree with the plaintiff that it is such an element.

[24] See discussion, supra, at n.15.

the documents. Docket Entry Nos. 106, at ¶ 7; 110, at ¶¶ 5, 10. Ms. Oldham's testimony about her communications with the defendants confirms that the plaintiff and defendants had established a **[20]** confidential relationship through which the plaintiff revealed its alleged trade secret.

Since the defendants do not dispute the existence of a confidential relationship through which the plaintiff communicated with the defendants, the Court finds that the defendants' acquisition of the plaintiff's concept, if found to be a trade secret, was through a confidential relationship.

C. Defendants' Use of Plaintiff's Alleged Trade Secret

The defendants are correct in their interpretation that the Arkansas Trade Secret Act and Tennessee law require that a defendant have misappropriated a secret for its own use or the use of a third party in order for a plaintiff to recover. Ark. Code Ann. § 4-75-601(2); Hickory Specialties, supra. The plaintiff is correct in its contention that, if valuable information obtained through the confidential relationship were supplied to others by the defendants without the plaintiff's consent, the defendants breached the confidential relationship with plaintiff and engaged in unfair competition. See Holmes v. Thew Shovel Co., 302 F. Supp. 139 (N.D. Ohio 1969). Therefore, if Wal-Mart and Llama breached their confidential relationship with the plaintiff, then Wal-Mart and Llama misappropriated the plaintiff's alleged trade

secret.

The plaintiff argues that the defendants breached their confidential relationship by supplying ARNI's information to others without ARNI's consent. As a result of this misappropriation of trade secrets, the plaintiff contends that the defendants have been **[21]** unjustly enriched and/or have obtained an unfair competitive advantage through inequitable conduct. See E. W. Bliss, supra.

The plaintiff bases its claim on inferences drawn from the facts. Plaintiff admits that there is no direct evidence of any transfer of information, but insists that, because the two systems are substantially similar, "a reasonable inference can be drawn from [the evidence of substantial similarity] that defendants Wal-Mart and America's Parade of Homes conspired or agreed to create a system which was nearly identical to plaintiff's system and worry about the consequences later given the amount of potential profits." Docket Entry No. 103, at 6.

The plaintiff asserts that Wal-Mart told the plaintiff that it was not interested in ARNI's project, but then began using a "nearly exact replica" of ARNI's real estate idea in Wal-Mart stores. Docket Entry No. 103, at 4. The plaintiff contends that the computer program installed by APH was substantially similar to the program that was disclosed by ARNI to Sydney Thompson, Vice-President of defendant

Llama. The plaintiff recognizes that the idea of selling real estate via computer video may have been a possibility prior to 1991. However, since the defendants were not in the real estate industry before their initial meeting with the plaintiff, and since "no other company in the world was marketing a similar system," id., the plaintiff believes that these facts lead to a reasonable inference that the defendants breached a confidential relationship and stole plaintiff's trade secret. [22]

The plaintiff alleges that the defendants had not actually entered into an agreement with Mr. Harwell or APH until January 1992, after Wal-mart had had the opportunity to obtain as much information from the plaintiff as possible. The plaintiff alleges that Wal-Mart also obtained confidential information from Llama, the Walton-owned investment banking group. The plaintiff further asserts that, if the defendants had entered into a contract with Mr. Harwell in 1991, the defendants "were engaging in reprehensible conduct" by continuing to refer the plaintiff to employees of its various Walton corporations so that the defendants could obtain more information about the plaintiff's trade secrets. Docket Entry No. 103, at 6.

Wal-Mart and Llama contend that the plaintiff cannot meet its burden of proof because there is no proof in the record that defendants Wal-Mart and Llama

misappropriated plaintiff's trade secret for its own use or for the use of a third party. The defendants argue that, based on the plaintiff's complaint and testimony of Theresa and Ross Oldham, the plaintiff's only evidence is the similarity between ARNI's system and APH's system. The Court agrees.

In her deposition, Theresa Oldham states that she relied upon the appearance of the system as it was depicted in a brochure published by APH and upon her observation of the APH system in concluding that the defendants had misappropriated her alleged trade secret. Docket Entry No. 40, Exhibit 1, at 519-524. In his deposition, Ross Oldham states that, after using the APH computer **[23]** system and examining the APH video and brochures, he was convinced that APH is using ARNI's system. Docket Entry No. 40, Exhibit 15, at 60. Ms. Oldham has provided the names of at least four individuals who allegedly told her that Wal-Mart had misappropriated ARNI's system. Mr. Oldham also testified that three of the people whom Ms. Oldham named and two additional people had told him that Wal-Mart or Llama had misappropriated the ARNI system.[25] However, the defendants point out that the Oldhams' testimony establishes that these individuals based their

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[25] The plaintiff has not, however, submitted affidavits from any of these individuals or otherwise provided direct evidence that they had any such knowledge.

statements on the manner in which the two systems had been presented to them, the evolution of the systems, the time frame in which they were established, and their similarity. Docket Entry No. 40, Exhibit 1, at 513-519; Exhibit 15, at 57-59. Neither Mr. or Ms. Oldham received any documentation or other information from Wal-Mart, Llama, or APH that the APH system was actually ARNI's system. Docket Entry No. 40, Exhibit 1, at 519.

Wal-Mart and Llama also contend that no one at APH received any information from their employees about ARNI's idea. In addition, Wal-mart and Llama assert that none of their employees used information received from ARNI for their own benefit, nor did any employees provide any information to a third party for the third party's benefit. The defendants have provided the affidavits of David Graham, Charles Rateliff, Dean Sanders, Becky Elliott, [24] Mary Moreland, and Terri Bertschy,[26] individuals

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[26] Although the defendants filed a Notice of Intent to File Affidavits of Dean Sanders, Charles Rateliff, Rick Johnson, Terry Bertschy, David Graham, Sydney Thompson, and Nicholas Alter (Docket Entry No. 45) by March 30, 1995, in support of their motion for summary judgment, the March 28, 1995, Notice of Filing (Docket Entry No. 47) reflected only that the affidavits of Alter (Docket No. 48) and Thompson (Docket Entry No. 49) were contemporaneously filed; the March 29, 1995, Notice of Filing (Docket Entry No. 67) reflected only that the

affidavits of Graham (Docket Entry No. 68), Bertschy (Docket Entry No. 69), and Rateliff (Docket Entry No. 70) were contemporaneously files; and the April 20, 1995, Notice of Filing (Docket Entry No. 91) reflected only that the Sanders affidavit (Docket Entry No. 92) was contemporaneously filed. The defendants never filed an affidavit of Rick Johnson, despite the reference to such an affidavit in the defendants' Rule 8 (b) (7) statement (Docket Entry No. 44, at ¶¶ 25, 27) and the defendants' memorandum (Docket Entry No. 43, at 4, 7-8). Although the defendants' motion for summary judgment (Docket Entry No. 40) refers to attached Exhibit 10 as the Johnson affidavit, the defendant attached to their motion only Exhibits 1-4, 8, 11, and 13-15; the Johnson affidavit was not attached.

Although the defendants referred to nine affidavits in support of their Rule 8 (b) (7) statement (Docket Entry No. 44, at ¶¶ 25, 27) that none of the affiants used the plaintiff's trade secrets for any purpose and that neither Wal-Mart nor Llama supplied any information received by the plaintiff to anyone at APH, the plaintiff's response to the defendants' statement of undisputed facts was simply "disputed." Docket Entry No. 104. Inasmuch as the plaintiff concedes that it has no evidence directly controverting the defendants' assertions and relies only on circumstantial evidence of the similarity of the systems and other events (Docket Entry No. 131, at ¶¶ 18, 25, 27), the defendants' failure to file the Johnson affidavit is not fatal, in light of the Elliott, Moreland, Thompson, Graham, Bertschy, Rateliff, and Sanders affidavits (Docket Entry Nos. 41-42, 49, 68-70, 92), and in light of the Harwell,

identified by Theresa and Ross Oldham as persons with whom they spoke at Wal-Mart or to whom they provided information concerning their alleged trade secrets. These individuals stated that they provided no such [25] information to APH, that they did not use the plaintiff's information for any purpose, and that, to the best of their knowledge, no one at Wal-Mart provided plaintiff's information to APH. Docket Entry Nos. 41-42, 68-70, 92.

Furthermore, in his affidavit, Mr. Graham, Director of Other Income Division of Wal-Mart, stated that he received APH's proposal on May 28, 1991, and decided on May 29, 1991, to test-market the system. He called Mr. Harwell on June 4, 1991, to arrange a meeting to discuss test-marketing the system. He further stated that APH centers have been in operation in Wal-Mart stores since the fall of 1991. Docket Entry No. 68, at ¶ 3-4, 8.

In his affidavit, Mr. Thompson denied that he provided any of the plaintiff's information to APH or Wal-

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Vaughn, and McDonough affidavits (Docket Entry No. 40, Exhibits 2-4), discussed above.

The plaintiff's response to the defendants' Rule 8 (b) (7) statement referred to the affidavit of Curtis Barlow when reciting the defendants' statement of undisputed facts. Docket Entry No. 104, at ¶ 125. However, defendants did not refer to an affidavit of Curtis Barlow, Docket Entry No. 44, at ¶ 25, nor was an affidavit of Curtis Barlow filed.

Mart, stated that he did not use the plaintiff's information for any purpose, and that, to the best of his knowledge, no one else at Llama had any contact with the plaintiff or provided plaintiff's information to APH, Wal-Mart, or anyone else. Docket No. 49, at ¶ 3-4.

Mr. Harwell stated in his affidavit that he developed the concept for the APH system before 1988, without any communication with Wal-Mart, the other defendants, or the plaintiff. He stated that "Wal-Mart did not make any recommendations as to the type of product or services we offered or as to the manner in which such product or services would operate." Docket Entry No. 40, Exhibit 2, at ¶ 2-3. Mr. Harwell also stated that he entered into the contract with Wal-Mart to test-market his system on June 4, 1991, prior to the date the plaintiff first met with Wal-Mart. Id., at [26] ¶ 4.

In his affidavit, Joe Vaughn, Chief Executive Officer of APH, confirmed that Mr. Harwell developed the APH concept prior to 1988, independently of Wal-Mart, other defendants, and the plaintiff. He stated that he had no knowledge of the plaintiff before it filed this lawsuit, and that the APH system was fully and independently developed by principals and employees of APH. Docket Entry No. 40, Exhibit 3, at ¶ 1-4.

In his affidavit (Docket Entry No. 40, Exhibit 4), James McDonough, President of APH, stated that he was

involved in the development, refinement, and improvement of APH's system since November of 1991, and, that he never received any guidance from Wal-Mart regarding development of the APH system. Mr. McDonough also stated that he never received any information pertaining to the ARNI system or even had any knowledge of the existence of the ARNI system.[27] [27]

The plaintiff has failed to provide any evidence in opposition to the defendants' proof that the defendants did not misappropriate the plaintiff's trade secrets, and has

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[27] Mr. McDonough further attested in his affidavit that Mr. Oldham had stated that he compared the APH system in the Memphis Wal-Mart store and the APH brochure available at that store to the ARNI System and found the systems identical. Mr. McDonough explained that such a conclusion was impossible since the brochure available in the Memphis store did not accurately describe the Memphis APH system since there had been "revisions, modifications, and enhancements" to the system after the publication of the brochure. Docket Entry No. 40, Exhibit 4, at ¶ 8.

The Court cannot readily locate the affidavit of Mr. Oldham to which Mr. McDonough apparently refers. The Court further notes that Mr. McDonough's affidavit is a certified copy of an affidavit filed in a prior action in the Chancery Court of Davidson County. However, the plaintiff's original complaint refers to ARNI's discovery in 1993 that the defendants had placed systems in Wal-Mart stores in Memphis that used the plaintiff's plans and system. Docket Entry No. 1, at ¶ 26. The plaintiff's amended complaint similarly refers to ARNI's discovery that the defendants placed such systems in Wal-Mart stores in 1993 in Tennessee and other states. Docket Entry No. 17, at ¶ 31.

failed to provide any significant, probative evidence to support an inference of such misappropriation. No genuine issues of material fact exist and no reasonable jury could find that the defendants misappropriated the plaintiff's trade secrets.

VI. RECOMMENDATION

As set forth above, see Section II, it is recommended that the plaintiff's motion to supplement (Docket Entry No. 183) be granted.

Based on the above analysis, it is further recommended that the defendants' motion for summary judgment (Docket Entry No. 40) be granted, and that all claims against all defendants be dismissed.[28]

Any objection to this Report and Recommendation must be filed within ten (10) of receipt of this notice and must state with particularity the specific portions of this Report and Recommendation to which objection is made. Any party opposing said objections shall have ten (10) days from service of any such objections filed to this Report and Recommendations in which to file any responses to said objections. See 28 U.S.C. § 636 (b)(1)(c); Rule 72(b) of

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[28] Although the motion for summary judgment was filed by defendants Wal-Mart and Llama, if the claims against them are dismissed, the claims against defendant APH would necessarily be dismissed as well.

the Federal Rules of Civil Procedure; Rule 505 of the [28] Local Rules Governing Duties of the Proceedings before Magistrates. Failure to file written objections within the specified time can be deemed a waiver of the right to appeal the District Court's order. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), reh'g denied, 474 U.S. 1111 (1986); United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

Respectfully submitted,

JULIET GRIFFIN (signature

Juliet Griffin
United States Magistrate, Judge

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

AMERICAN RELOCATION NETWORK INTERNATIONAL, INC.	§
v.	§ No. 3-94-0938
	§ Judge Higgins
WAL-MART STORES, INC. et al.	§

ORDER

The Court has before it the Magistrate Judge's Report and Recommendation (entered February 14, 1996; Docket Entry No. 195) and the plaintiff's objections (filed March 6, 1996; Docket Entry No. 200); the partial objection (filed February 26, 1996; Docket Entry No. 199) of defendants, Wal-Mart Stores, Inc. and Llama A.W. Corporation; and the response (filed March 20, 1996;

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Docket Entry No. 202) of the same defendants to the plaintiff's objections.[1]

The Court has independently reviewed the Magistrate Judge's findings and conclusions, the objections and the entire record. [1]

The objections raise no new matters of substance that are not addressed in the careful and well-reasoned analysis of the Magistrate Judge. Nothing would be accomplished by writing further in an attempt to improve upon the work of the Magistrate Judge. The objections are overruled. The Report and Recommendation is adopted and approved in all respects and made the opinion of the Court.

Accordingly, the plaintiff's motion (Docket Entry No. 183) to supplement the record is granted.

The motion (filed March 24, 1995; Docket Entry No. 40) of the defendants, Wal-Mart Stores, Inc. and Llama A.W. Corp., for summary judgment is granted.[2]

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[1]The Court also has before it the plaintiff's objection (filed March 6, 1996; Docket Entry No. 201) to the Magistrate Judge's order (entered February 14, 1996; Docket Entry No. 194) granting the defendants' motion to exclude portions of the plaintiff's response to the defendants' statement of undisputed facts. The Magistrate Judge was correct in granting the motion to exclude based on the plaintiff's conceded failure (See Docket Entry No. 201) to comply with the Rule 8(b)(7)(c), Local Rules of Court. Nevertheless, the Court has considered, as a part of its de novo review, the plaintiff's responses to the defendants' Rule 8(b)(7) statement, despite the lack of specific citations to the record, as well as the additional facts asserted by the plaintiff.

[2]As noted by the Magistrate Judge, although the motion for summary judgment was filed by defendants Wal-Mart and Llama, if the claims against them are dismissed, the claims against the defendant

This action is dismissed as to all remaining defendants with prejudice.

Entry of this order, together with the orders entered December 22, 1994, (Docket No. 19) and July 6, 1995 (Docket Entry No. 134), shall constitute the judgment in this action.

It is so ORDERED.

Thomas A. Higgins (Signature)
Thomas A. Higgins
United States District Judge
3/21/96

APH would also be dismissed. Report and Recommendation at 28.

96-5540

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed 9/29/97

AMERICAN RELOCATION NETWORK) INTERNATIONAL, INC.	)	**Leonard Green** **Clerk**
Plaintiff-Appellant,	)	ORDER
v.	)	
WAL-MART STORES, INC., ET AL.	)	
Defendants-Appellees.	)	

BEFORE: JONES SUHRHEINRICH, and SILER, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

96-5540

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED
U.S. District Court
Middle District
Jul 24, 1995
By D.GR
Deputy Clerk

AMERICAN RELOCATION NETWORK INTERNATIONAL, INC.
Plaintiff,

v.

WAL-MART STORES, INC. et al.
Defendants.

FILED
Sep 20, 1996
Leonard Green, Clerk
D.E. 167

No. 3-94-0938
Judge Higgins

TRANSCRIPT OF HEARING -
STATUS CONFERENCE
BEFORE THE HON. THOMAS A. HIGGINS,
U.S. DISTRICT JUDGE On July 20, 1995

APPEARANCES:

Mr. Richard Baker
Attorney at Law
Knoxville, Tennessee
on behalf of the Plaintiff;

Mr. Richard K. Smith
Attorney at Law
Nashville, Tennessee
on behalf of Defendant Wal-Mart Stores, Inc.

Page 48, line 25 through page 50, line 24:

Now the remaining issue is this litigation. And I'm [48] going to deny the motion in that respect. Whatever relevancy it has, its probative value would be outweighed under 403, and I recognize it need not be directly admissible if it would lead to other admissible evidence, but, Mr. Baker, we're going to try this lawsuit, and I can tell by the extent of this discovery and the squabbles that we have got all we can say grace over and the number of theories, because I think you may have more theories than you can handle. And I've cautioned you about the three important rules of keep it simple, keep it simple, keep it simple, because we're not going to devote the summer to this. You're just going to have to get on with it. A lawyer can outsmart himself by having too many theories and get a lawsuit too complicated. These people who come in here to try this lawsuit, all they are going to know about this controversy is what they hear over a period of four or five days. And as I said earlier, you got to spell it out. That's the art of being a trial lawyer, without being condescending, but you got to spell it out in black letters. And march on. We don't try lawsuits here like they are tried in Southern California where they go on for nine months. And we have got this lawsuit, and whatever probative value, assuming the relevance of other litigation,

that the probative value would substantially be outweighed, and I would almost, without doubt, grant a motion in limine, **[49]** by the risk of confusion of the issues or misleading the jury or considerations of undue delay, waste of time or needless presentation of evidence under 403. For every lawsuit that might be introduced that Wal-Mart's been in some other court, that would necessitate Wal-Mart meeting it and coming in and putting in counter evidence to show the distinctions and the differences. And we've got this lawsuit between American Relocation Network and three defendants, and we are simply not going to get bogged down in a — because the only way, if you put in that they have been sued, then they are entitled to come in and prove they got a directed verdict or disposition, and also to show how it differs from this lawsuit. And that goes right into the teeth of 403 on the delay, waste of time and needless prolongation of the proceedings. So it's just an expense and work that the court is not going to authorize. And I notice that your law clerk has already got two and-a-half pages through her own energies of various lawsuits involving Wal-Mart. It's the attachment to your supplemental pleadings. But we're going to try this lawsuit and we're not going to get bogged down in what Wal-Mart was sued in the Eastern District of Texas at Tyler, Tyler, Texas. We would be here till next Easter. And we are just simply not going to get bogged down in irrelevancies...

[51] On the morning of trial give me your proposed jury instructions and verdict forms.

Mr. Baker, I'm going to put down what I call my RICO order right now, soon as I can get to it, and I'm going to give you a few days, it's going to require you to respond in detail, that's going to help me manage this RICO aspect [52] of it, and this is for the benefit of the court, that you furnish a certified copy to each of your adversaries, Mr. Vaughn and Mr. Smith, but I've got a standing RICO order that I require the plaintiffs who bring a RICO case to respond to because it helps me test the matter and also prepare the jury instructions.

Now let's see, how many different legal theories do we have here? We got a RICO claim, a breach of confidentiality agreement. Where was that contract? Where was that contract made, Mr. Baker? So I can tell what you say is the law that governs that?

MR. BAKER: Well, the one with defendant Wal-Mart was made by telephone with plaintiffs in Tennessee and defendants in Arkansas.

THE COURT: Well, where do you say the contract was formed so that --

MR. BAKER: Here in Tennessee.

THE COURT: All right. The breach of contract agreement with Wal-Mart is you say a Tennessee contract?

MR. BAKER: Yes, Your Honor.

THE COURT: The last act necessary for the forming of that contract was performed in Tennessee?

MR. BAKER: The last agreement that was made, we asked them to agree, they --

THE COURT: Is that oral or written? **[53]**

MR. BAKER: It is written — it's oral. The one with Wal-Mart is oral.

THE COURT: Oral. As a part of that contract, was there any agreement as to choice of law?

MR. BAKER: No, Your Honor.

THE COURT: Well, you got a RICO claim and you got a breach. You have got a RICO claim, breach of an oral agreement with Wal-Mart of confidentiality.

MR. BAKER: Yes, Your Honor.

THE COURT: Contract made in Tennessee. What's your third one?

MR. BAKER: Misappropriation of trade secrets.

THE COURT: Misappropriation of trade secrets. Where did this occur?

MR. BAKER: That's a tough question.

THE COURT: Well, you're bringing the lawsuit. You have got the laboring oar and have to declare it. Where did this — this is a tort?

MR. BAKER: Yes, Your Honor.

THE COURT: It's a tort. And where did it occur?

MR. BAKER: We say here in Tennessee. The

consequences were caused here in Tennessee.

THE COURT: Plaintiff says Tennessee law governs. You're going to have to be prepared to brief that carefully under your choice of law and the so-called new rules, **[54]** Supreme Court of Tennessee. That's three. That's a tort claim for misappropriation of trade secrets.

What's the fourth one?

MR. BAKER: Conversions of business property.

THE COURT: Conversion of business property. Is that another word for trade secret?

MR. BAKER: Yes, Your Honor.

THE COURT: Why don't you just call it, if you call misappropriation of trade secrets, why don't you call it conversion of — you call it conversion of business property?

MR. BAKER: Yes, Your Honor.

THE COURT: But the business property is trade secrets, that right?

MR. BAKER: It is, Your Honor.

THE COURT: All right, the same trade secrets that is the subject of cause of action number three, misappropriation?

MR. BAKER: Not exactly. The business property was the business plan. The trade secret was what was contained in the business plan.

THE COURT: The trade secret and what was

converted?

MR. BAKER: The concept. The idea of listing real estate listings in the manner that was contained in the [55] business plan.

THE COURT: And this is a tort. And what law does plaintiff say governs?

MR. BAKER: Tennessee.

THE COURT: The conversion, it was converted here in Tennessee?

MR. BAKER: The consequences were caused here in Tennessee, the damages.

THE COURT: What damages are a different cause of action four from cause of action three?

MR. BAKER: The damages are all the same. The cost of development, loss of profits, and --

THE COURT: Well, if you don't have different damages, and you don't get any more damages, what's the benefits of having a host of theories? The object is not to prove how smart you are and how many different legal theories you know, but to get the best result for your client.

MR. BAKER: Your Honor, --

THE COURT: Every time you put out another legal theory you've just running the risk of error in the record. A plaintiff wants a good clean record. The more theories you have the defendants got more things to shoot a hole in with regard to jury instructions and every other issue. I don't

understand why you would want a whole bunch of [56] theories, what you want is a judgment --

MR. BAKER: We are --

THE COURT: — that you can sustain on appeal.

MR. BAKER: We may narrow it down some, but for present purposes and in preparing our proof, --

THE COURT: Well, the narrowing down time is coming pretty quick. And secondly, it's a real needless inconvenience and burden to the magistrate and to the court to have a deal with a bunch of theories that are going to be jettisoned overboard later.

MR. BAKER: We are --

THE COURT: We're not down here for any kind of academic exercise. And no need to write a memorandum and spend time making an analysis and reading the authorities on a challenge to various theories that are going to be tossed overboard.

MR. BAKER: We understand. You know, just trying to do our best for our client. Not letting a cause of action go until we are sure we should.

THE COURT: I suggest to you the art of lawyering, assuming competency and integrity, rests in judgment.

All right, Conversion of business property.

What's the fifth one?

MR. BAKER: Fraud.

THE COURT: Fraud. That's a tort. Where was the

[57] fraud committed?

MR. BAKER: Well, again the consequences were caused here in Tennessee.

THE COURT: Any other?

MR. BAKER: The last one would be constructive fraud.

THE COURT: Fraud and constructive fraud?

MR. BAKER: Yes, Your Honor.

THE COURT: Now --

MR. BAKER: We are including it because of some alleged testimony or testimony we expect is going to come from the defendants.

THE COURT: What's the difference in the damages between just garden variety fraud and so-called constructive fraud?

MR. BAKER: The damages are the same, but constructive fraud does not require proving intent.

THE COURT: And where did the constructive fraud occur?

MR. BAKER: Again, the consequences were caused here in Tennessee. The act, the fraud could have happened in Arkansas, but the consequence were caused here.

THE COURT: Is that all the theories?

MR. BAKER: I believe that is it, Your Honor.

THE COURT: Well, you better have a good careful

[58] brief on it and also on this question of the choice of law and how you hang your hat on Tennessee law as opposed to Arkansas law.

End of Excerpt

UNITED STATES CONSTITUTION
FIFTH AMENDMENT

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

Racketeer Influenced Corrupt Organizations Act

18 U.S.C. § 1961 Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425

(relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to

use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying,

selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose

of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

CREDIT(S)

1984 Main Volume

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941, and amended Pub.L. 95-575, § 3(c), Nov. 2, 1978,

92 Stat. 2465; Pub.L. 95-598, Title III, § 314(g), Nov. 6, 1978, 92 Stat. 2677.)

1997 Electronic Update

(As amended Pub.L. 98-473, Title II, §§ 901(g), 1020, Oct. 12, 1984, 98 Stat. 2136, 2143; Pub.L. 98-547, Title II, § 205, Oct. 25, 1984, 98 Stat. 2770; Pub.L. 99-570, Title XIII, § 1365(b), Oct. 27, 1986, 100 Stat. 3207-35; Pub.L. 99-646, § 50(a), Nov. 10, 1986, 100 Stat. 3605; Pub.L. 100-690, Title VII, §§ 7013, 7020(c), 7032, 7054, 7514, Nov. 18, 1988, 102 Stat. 4395, 4396, 4398, 4402, 4489; Pub.L. 101-73, Title IX, § 968, Aug. 9, 1989, 103 Stat. 506; Pub.L. 101-647, Title XXXV, § 3560, Nov. 29, 1990, 104 Stat. 4927; Pub.L. 103-322, Title IX, § 90104, Title XVI, § 160001(f), Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 1987, 2037, 2150; Pub.L. 103-394, Title III, § 312(b), Oct. 22, 1994, 108 Stat. 4140; Pub.L. 104-132, Title IV, § 433, Apr. 24, 1996, 110 Stat. 1274; Pub.L. 104-153, § 3, July 2, 1996, 110 Stat. 1386; Pub.L. 104-208, Div. C, Title II, § 202, Sept. 30, 1996, 110 Stat. 3009-565; Pub.L. 104-294, Title VI, §§ 601(b)(3), (i)(3), 604(b)(6), Oct. 11, 1996, 110 Stat. 3499, 3501, 3506.)

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt

in which such person has participated as a principal within the meaning of § 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

CREDIT(S)

1984 Main Volume

(Added Pub.L. 91-452, Title IX, S 901(a), Oct. 15, 1970, 84 Stat. 942.)

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law--

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any--

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes--

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited

to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the

hardship on any party against whom the order is to be entered: Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court

shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person,

other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding § 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to--

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property

ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to--

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to

informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United

States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same
time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of

the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant

or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant--

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the

defendant up to the value of any property described in paragraphs (1) through (5).

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(Added Pub.L. 91-452, Title IX, S 901(a), Oct. 15, 1970, 84 Stat. 943.)

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(As amended Pub.L. 98-473, Title II, SS 302, 2301(a)-(c), Oct. 12, 1984, 98 Stat. 2040, 2192; Pub.L. 99-570, Title XI, S 1153(a), Oct. 27, 1986, 100 Stat. 3207-13; Pub.L. 99-646, S 23, Nov. 10, 1986, 100 Stat. 3597; Pub.L. 100-690, Title VII, SS 7034, 7058(d), Nov. 18, 1988, 102 Stat. 4398, 4403; Pub.L. 101- 647, Title XXXV, S 3561, Nov. 29, 1990, 104 Stat. 4927.)

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any

person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant

from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

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(Added Pub.L. 91-452, Title IX, S 901(a), Oct. 15, 1970, 84 Stat. 943.)

18 U.S.C.A. S 1965

UNITED STATES CODE ANNOTATED

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I--CRIMES

CHAPTER 96--RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Copr. C West Group 1997. No Claim to Orig. U.S. Govt. Works

Current through P.L. 105-41, approved 8-13-97

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any

district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

CREDIT(S)

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(Added Pub.L. 91-452, Title IX, S 901(a), Oct. 15, 1970, 84

Stat. 944.)

Crimes by health care providers. Pamela H. Bucy, § 1996 U.Ill.L.Rev. 589.

Quiet revolution: Securities arbitration confronts the hard questions. Joel Seligman, 33 Hous.L.Rev. 327 (1996).

18 U.S.C.A. S 1966
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UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
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Corp. C West Group 1997. No Claim to Orig. U.S. Govt. Works

Current through P.L. 105-41, approved 8-13-97

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney

General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

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(Added Pub.L. 91-452, Title IX, S 901(a), Oct. 15, 1970, 84 Stat. 944.)

1997 Electronic Update

(As amended Pub.L. 98-620, Title IV, S 402(24)(B), Nov. 8, 1984, 98 Stat. 3359.)

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

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(Added Pub.L. 91-452, Title IX, S 901(a), Oct. 15, 1970, 84 Stat. 944.)

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall--

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall--

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by--

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be

accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the

possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of--

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly--

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor

so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is

found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

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(Added Pub.L. 91-452, Title IX, S 901(a), Oct. 15, 1970, 84 Stat. 944.)

FEDERAL RULES OF EVIDENCE

R. 403 Rules of Evidence. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1932.)

FEDERAL RULES OF CIVIL PROCEDURE

Rule 26. General Provisions Governing Discovery

(b)(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 56 - Summary Judgment

(a) **For Claimant:** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is assessed or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the

amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court is at the hearing of the motion, by examining the pleadings and the evidence before it and by the interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this

rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987).

28 U.S.C. § 1254(1) Court of appeals, certiorari; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1331 Federal Question.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub. L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, Pub. L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, Pub. L. 967-486, § 2(a), 94 Stat. 2369.).

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent

residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title--

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or

incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

CREDIT(S)

1993 Main Volume

(June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, S 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88- 439, S 1, 78 Stat. 445; Oct. 21, 1976, Pub.L. 94-583, S 3, 90 Stat. 2891; Nov. 19, 1988, Pub.L. 100-702, Title II, SS 201(a), 202(a), 203(a), 102 Stat. 4646.)

1997 Electronic Update

(As amended Oct. 19, 1996, Pub.L. 104-317, Title II, S 205(a), 110 Stat. 3850.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

AMERICAN RELOCATION NETWORK INTERNATIONAL, INC. PLAINTIFFS

V. NO. 3-94-0838

WAL-MART STORES, INC.
A. W. LLAMA CORPORATION,
WALTON ENTERPRISES II
LIMITED PARTNERSHIP,
AMERICA'S PARADE OF HOMES,
INC., AND McNAUGHTON
ENTERPRISES, INC., d/b/a
REAL ESTATE CENTRAL -
McNAUGHTN DEFENDANTS

DEPOSITION OF ERWIN DAVIS

Take at the offices of Erwin Davis, 103 North College Avenue, Fayetteville, Arkansas, on the 30th day of March, 1995.

SHARON ELLEN BARGER, CVR
CERTIFIED COURT REPORTER
ROGERS, ARKANSAS
(501) 636-3617

(COPY)
(Attached #131)

ERWIN DAVIS - PAGES 16, 27, 28, 50, 53

FILED
U.S. District Court
Middle District
May 19, 1995
By: D. DM
Deputy Clerk

(Attached #104)

[15] me, he told me a little bit about why he thought the thing would work and, uh, that is, he said, "It never needs to make a telephone ring." And he said, "The customer is not really the Wal-Mart customer." the, the, the— what the whole thing I think would be designed to do would be designed to, uh, uh, sell real estate brokers with the notion that if they advertised on this, then they would never need to make the tel— they'd never need to sell anything by the use of it because the money comes from the other end, the listing end.

Q. Okay.

A. And, uh, I was having a little bit of difficulty grasping that concept. And it's kind of like when I grasped the concept, it was kinda like, "Seems like it oughta work" because APH ought to be able to go around to the various real estate brokers in large markets and sell a sufficient number of brokers with the idea that "if you don't advertise on our Wal-Mart machine, then it may never make your telephone ring." But nevertheless, when you are competing for a listing, you can tell those people, "Look, if you list with us, then, uh, then, uh, we'll help market your house through the, the Wal-Mart stores." And, uh, so the idea — I mean at least on paper it seemed like a good idea and I thought that it was a good idea. And he said, "What you ought to do is come out and just meet these people and see what you think." There wasn't too much, uh, uh, overbearing Christianity in [16]

[26] dollar per page that's 'X' dollars a month." And if I recall correctly they were just going to pay Wal-Mart, uh, a few hundred dollars for the rental space, which would sound like an awful amount for the space that a machine that's three foot wide and two foot deep would be, but, uh, nevertheless, it would be — actually I'm surprised that Wal-Mart would be willing to let it go so cheap. And there was even some expressions of some worry, uh, about whether or not once Wal-Mart figured out what it was they were sitting on, what it was they had, they, they might would later try to, uh, uh, decide to go into it for themselves.

Q. Who made those statements?

A. I don't know. I remember there was just some comments about, uh, APH trying to protect themselves in the future from Wal-Mart and additionally, — and I don't know the particular people that were talking, but they thought they had really such a good deal with Wal-Mart that they wanted to get in, get into it and, get Wal-Mart on as long a term contract. Yeah, that's another thing. It was presented at the meeting in Fayetteville at the Park Inn that, that they, they thought they had a lock on it because they had been assured by Wal-Mart that they, that they had the contract but that the exact specific form of it was still in, in, in the making and what — and there was some conversation about whether or not Wal-Mart would actually go, uh, a longer term [27] deal which is what APH was shooting for, like two or three

years. And, uh, uh, the, the, uh, and, and Wal-Mart wanted to keep it confined to one year or two years, in any event, a shorter term then what APH wanted. APH wanted to get them locked in on a contract that would, uh, that would, uh, that would be for a fixed dollar rental for the longest time. And then by the time everybody met over in Memphis, uh, they assured us that they did have the contract that they wanted. Now, that's the way I am recalling it.

Q. All right. So it was your understanding then when you met here in, uh, Fayetteville the first time that they didn't have an agreement yet with Wal-Mart?

A. I understood that they had a working agreement, a handshake of some sort and a tacit approval of some sort, but that they were still working on the written form of the contract.

Q. Okay.

A. Now, that's they way I understand it. And I don't know — I recall that talk — you're asking me to remember about three years ago and I really didn't know those people that, that I, that was even talking with, I'd never seen them before in my life.

Q. All right, were some of those people the Baileys or Ed Harwell? Do you remember Ed Harwell?

A. Yeah. I remember the senior Mr. Bailey like the back of

[28]

[52] there because of some of us were — there was mixed emotions on the possible reps, uh, theat they were trying to get lined up, uh, there was some mixed emotions on whether or not this band of Mountain Home people would be able to really, you know, cinch it down with Wal-Mart. And then by the time the Memphis thing had occurred, it was apparently clinched down with Wal-Mart. And also they had sold some interest — and I've forgotten whether it was 51 or 49 or some other percentage — to the Memphis people.

Q. Okay.

A. Really, I loved the Mountain Home people. It was the — and I did the deal even though, uh, I knew that the Memphis people, uh, were uh — I just thought they were injecting Christianity into the business deal too much and that, uh, uh — I mean I think everybody should have their religion, but I just don't think it ought to be the basis and that's the really the Memphis meeting that was the only downside I thought.

Q. Okay.

A. I thought they were acting like they were trying to swing the business to just good old Christian boys and that if you didn't profess Christianity then you had no place in their business organization and I just have some personal problems with that.

Q. Okay. Don't want to mix business with religion. [53]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

AMERICAN RELOCATION NETWORK
INTERNATIONAL, INC. – PLAINTIFF

VS

WAL-MART STORES, INC. DEFENDANTS
A.W. LLAMA CORPORATION
WALTON ENTERPRISES
II LIMITED PARTNERSHIP
AMERICA'S PARADE OF HOMES, INC.
McNAUGHTON ENTERPRISES, INC.
D/B/A REAL ESTATE CENTRAL-McNAUGHTON

* * * * * * * *

DEPOSITION OF JOE SAMUEL BAILEY, TAKEN THURSDAY, APRIL 6, 1995, AT THE RAMADA INN, HIGHWAY 62 EAST, MOUNTAIN HOME, ARKANSAS, TAKEN AT THE INSTANCE OF THE PLAINTIFF, AT THE HOUR OF 10:30 A.M.

* * * * * * * *

APPEARANCES:

FOR THE PLAINTIFF: MR. RICHARD BAKER
GILREATH & ASSOCIATES
ATTORNEYS AT LAW
P.O. BOX 1270
KNOXVILLE, TN 37901-1270

FOR THE DEFENDANTS: MR. MICHAEL K. BASSHAM
ATTORNEY AT LAW
FIFTH FLOOR, 200 FOURTH AVENUE NORTH
NASHVILLE, TN 37219

ALSO PRESENT: Ross Oldham and Theresa Oldham
Patricia Irby, C.C.R.
1214 Heatherdown Trail
Mountain Home, Arkansas 12653
(501) 424-6177

(Attached #131)

FILED
U.S. District Court
Middle District
May 19, 1995
By: D. DM
Deputy Clerk

EXCERPT FROM DEPOSITION OF:

S. BAILEY - PAGES 4, 5, 7, 8, 12, 16

(Attached #104)

DEPOSITION OF JOE SAMUEL BAILEY
PAGE 4
PROCEEDINGS

(WITNESS SWORN)

JOE SAMUEL BAILEY, the deponent herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RICHARD BAKER, JR.:

Q. State your name.

A. Joe Samuel Bailey.

Q. And your current address?

A. Route 1 Box 484, Cotter, Arkansas 72626.

Q. All right. How do you know Ed Harwell?

A. Ed Harwell's a member of my church that I pastor.

Q. And how long have you known Ed?

A. I've known Ed, let's see, I've been here 12 years, and I've probably known Ed about 10 years.

Q. Okay. And when is the first time he ever mentioned anything to you about selling real estate by video?

A. Probably, oh, several years ago, Ed talked to me about an idea he had. And at that time, he talked about using robotics in a machine that would attract people to it through the use of some sort of a robot system. And I wasn't too

thrilled with that concept at that time. And then later on, he came to me and told me about his idea with a kioask and with the photographs and that sort of thing.

Q. All right. My question was when.[4]

DEPOSITION OF JOE SAMUEL BAILEY
PAGE 5

A. Boy. Okay, I'll have to just try to say that the best I remember.

Q. Yeah, do your best.

A. Probably 1990.

Q. Okay. And could have been '91?

A. Yeah, could have been.

Q. Could have been '92?

A. Yes.

Q. Okay. You're not real sure?

A. I'm not real sure.

Q. Okay. Where were you while he first discussed it, do you recall?

A. Yes, sir. Sitting in the vehicle in the driveway of my parents' home.

Q. All right. And what did he ask you to do, if anything, as far as getting involved?

A. Ed had the idea and, basically, wanted to know if my

dad and me would be interested in helping to back him financially in the idea.

Q. Why did he come to you guys for financial assistance, do you know?

A. Probably because my dad has been involved in a lot of different things and has worked very hard at several different businesses.

Q. Okay. Did he tell you why or did, or are you just - [5]

DEPOSITION OF JOE SAMUEL BAILEY
PAGE 7

Q. Annette? Okay. How did you, then, get involved with Ed in the, what was your involvement?

A. I thought it was a good idea. And I really became interested when Id told me that there might be a possibility of Wal-Mart being involved in the location for the kiosks. That's what really go us interested.

Q. When did he tell you Wal-Mart might get involved?

A. Probably six months to a year after our initial conversation.

Q. Okay. And would that have been, when? Do you remember when he told you that?

A. Well, based on the fact I don't remember the first conversation, it's hard for me, I don't...

Q. Okay. Well, let me, do you remember a meeting in Fayetteville?

A. Yes.

Q. You attended that meeting?

A. Yes, I did.

Q. That was November of '91?

A. Okay. Then based on that, November of '91, Ed probably told me in, four or five months prior to that time that Wal-Mart would probably be interested.

Q. Okay. Did he tell you who at Wal-Mart had told him 11 they'd be interested?

A. Ed had a friend who worked for Wal-Mat. And this friend [7]

DEPOSITION OF JOE SAMUEL BAILEY

Page 8

got him an appointment with the man that was responsible for placement of the kiosks. And I don't remember the man's name.

Q. Charles Ratliff??

A. Charles Ratliff.

Q. Okay. All right. So he told you, then, just a few months before the November meeting of Wal-Mart being interested?

A. No, it wasn't a few minutes--well, let me think just a minute. I probably knew that Wal-Mat was interested, no, I did know Wal-Mart was interested maybe a month prior to that meeting.

Q. Okay. At the time of the Fayetteville meeting, did, to you knowledge--well, strike that. Let me back up. Had you and Ed entered into any kind of a partnership or anything prior to November of 1991?

A. There was nothing legal.

Q. Okay.

A. I think we shook hands on, and we talked back and forth about my dad's involvement. My dad got more involved and put more money into it. We made like a $18,000 loan at the bank to get the idea off the ground. And so---

Q. Do you remember when that loan was made?

A. No, I don't.

Q. Which bank?

A. It was Worthen National Bank in --- **[8]**

DEPOSITION OF JOE SAMUEL BAILEY

Page 11

A. --- that we met.

Q What was the purpose in going over there?

A. To solicit Wal-Mart's permission to place these kiosks in their stores.

Q. Who attended this meeting?

A. Ed Harwell, me and my dad.

Q. Anyone else?

A. See, there were two meetings with David, in David

Graham's office. I went over there two different times. One time I think it was me and Ed and the next time I think it was me and Ed and my dad.

Q. Okay.

A. And I don't remember if there was anyone else there that met us there. I don't think there was.

Q. Okay.

A. I think maybe one of David Graham's assistants may have been in there.

Q. Okay. When you went to, do you remember when the first time you went was?

A. We went and presented the idea to David Graham. And then we went back probably two months later to try to get a firm agreement with them. And then that precipitated the November meeting. When we had that November meeting, we had an agreement with Wal-Mart that we were going to be able to do this on a trial basis.

Q. Okay. Was that a verbal agreement?

A. I never saw any paperwork on it. Ed, Ed handled all that. But I understand that we were issued a vendor number, so there must have been some kind of an agreement.

Q. Okay. Did you ever sign anything with anybody at Wal-Mart to do this?

A. If I signed anything with Wal-Mart, I don't remember

signing it.

Q. Okay. Did you ever sign anything while you were over in Bentonville at their offices?

A. I signed the register.

Q. Okay. Anything else?

A. I don't, I don't remember signing anything else. It doesn't mean I didn't sign that original, the, whatever they require to get a vendor number. I may have signed that.

Q. Okay.

A. I don't know.

Q. All right. Did you sign--all right. Who set up the November 1991 meeting?

A. Me and Ed set it up with a group, what we'd tried to do was to develop the concept in the Fayetteville, Bentonville, Springdale area first.

Q. Uh-huh.

A. And there were several realtors over there that were interested in the concept, so we set the meeting up to explain

[12]

DEPOSITION OF JOE SAMUEL BAILEY

Page 16

Q. That's what he said.

A. Okay.

Q. Okay.

A. I'll take your word for it.

Q. All right.

A. You look honest.

MR. BASHAM: I'll object to the testimony.

MR. BAKER:

Q. (Continuing) Now, what happened to that video tape? First of all, who all wanted a copy of it?

A. I don't know what happened to it, and I don't know who wanted a copy of it. I don't, I never looked at it. There was a lot of activity, people were very interested in the concept of Wal-Mart being involved in allowing us to display real estate information. And someone got the tape immediately and I never saw it. And I'm not even going to speculate who got it.

Q. Okay. Can you tell me whether or not that's your signature?

(Whereupon, a document is examined by the witness.)

A. Yes, it sure is, uh-huh.

Q. Okay. Do you know when you--have you ever seen this before?

A. Since I signed it, you know I've seen it. **[16]**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

AMERICAN RELOCATION NETWORK INTERNATIONAL, INC.
V.
PLAINTIFFS
NO. 3-94-0838

WAL-MART STORES, INC.
A.W. LLAMA CORPORATION,
WALTON ENTERPRISES II
LIMITED PARTNERSHIP,
AMERICA'S PARADE OF HOMES,
INC., AND McNAUGHTON
ENTERPRISES, INC., d/b/a
REAL ESTATE CENTRAL -
McNAUGHTON
DEFENDANTS

DEPOSITION OF DAN BORENGASSER

Taken at the offices of Ozark Film & Video Production, Incorporated, 3804 Kelley Avenue, Springdale, Arkansas, on the 31st day of March, 1995, beginning at 9:04 a.m.

SHARON ELENBARGER, CVR
CERTIFIED COURT REPORTER
ROGERS, ARKANSAS
(501) 636-3617

(Attached #131)

FILED
U.S. District Court
Middle District
May 19, 1995
By: D.DM
Deputy Clerk

EXCERPT FROM DEPOSITION OF:

BORENGASSER - PAGES 13-16, 26, 30, 31, 35

(Attached #104)

for Wal-Mart?

MR. BAKER: Right.

CONTINUATION BY MR. BAKER:

Q. Yeah, just Wal-Mart.

A. I understand. Uh, they have a, uh, they have a video department. An normally it would be with the video department or, uh, like a buyer or two that maybe we have a relationship with. I mean they're — it can come from any different — several different sources but mostly it would be through their video department.

Q. Okay. As a part of their marketing department?

A. Uh, not so much marketing, more like, uh, training -

Q. Okay. All right.

A. — I guess and marketing too. I mean, there's that aspect to it, but as far as advertising and commercials, uh, that's their completely different thing.

Q. Okay. Do you — have you ever had any contact with a fellow named Paul Higham? H-i-g-h-a-m.

A. Not that I recall.

Q. All right. Now after the meeting at the Clarion, you came back here then, I guess, to begin working on your script and your production. How long did it take until you had the production complete? Uh, the broker version as I understand it was done first.

A. That seems to be right. I would think that's right.[13]

Q. Okay. How long did it take to do that?

A. Um, well, I would have to just go by this. I would, I would say that, uh, the original deposit was November for that, so that would have been probably, uh, within a couple of weeks after contact with them I would guess because that would have been an advance.

Q. Okay.

A. Uh, and then the final — the production was done in December.

Q. When you say "done", you mean completed?

A. Yes. The shoot was like, uh, December the 10th, edits, uh, December 11th and 12th. And so at that point it would have been sent to them for approval.

Q. Sent to whom?

A. America's Parade of Homes.

Q. Okay.

A. And, uh, uh, obviously we had to change something and that was done on the, December 23rd.

Q. Okay. So it took from December the 12th until December the 23rd. All right, so you sent it out December 12th to APH for approval and then it took them about 12 or — 12 days or so to, uh, get back to you?

A. Or us that long to do it. I mean, you know, we've got — sometimes we'll have a backlog. Uh --

Q. Especially at Christmas. **[14]**

A. So --

Q. Let me, let me look at the document with you here.

This is the first one, right?

A. That's right.

Q. Okay, looking at the second one, which is numbered 001650, um --

A. That's the shooting.

Q. Actually the shoot. When you say the shoot, it was done December the 10th ?

A. Right.

Q. And it was done at Rogers. What is this, Rogers studio? That's --

A. Rogers, the Rogers store, Wal-Mart, and then our studio.

Q. I see. And it took two and a half hours.

A. Right.

Q. Who would have done that shoot?

A. Um, the Rogers shoot I was on and, uh — I didn't do the shooting, my partner did the shooting.

Q. And what is his name?

A. Bill McFetridge > M-c-F-e-t-r-i-d-g-e.

Q. Okay.

A. And then the studio shot, I don't know. It could have been — it more likely was one of our, one of our shooters, but it could have been Bill as well.

Q. Okay. Do you remember who else was in attendance at the [15] Rogers --

A. I was.

Q. — store other than you and Bill?

A. Um, uh, an employee named Doyle Rowlan.

Q. Doyle Rowland?

A. R-o-w-l-a-n.

Q. Who is he? An employee of yours?

A. He was an employee of ours.

Q. Okay. All right. Anyone else?

A. I think that's it.

Q. Was there anyone from Wal-Mart there?

A. Um, I mean other than to let us in, I mean, no, I mean, there was no one producing it. In fact, their — neither Wal-Mart's nor America's Parade of Homes people were there. We were pretty much doing this on our own after permission to shoot, was, I suppose, uh, secured.

Q. Okay. Was this done during regular business hours or before or after?

A. I think it was very early in the morning.

Q. Okay. And so somebody had to let you in the store?

A. Um, I don't remember if that's the case or not. They may be 24 hours. I don't remember.

Q. Okay. Um, all right, let's see. On down here. Then it was edited.

A. Over two days. **[16]**

[25] A. Um, well, it looks like it's just a statement showing that they owed 76.48.

Q. And still showing unpaid?

A. Uh, I don't know that.

Q. Okay.

A. Well, actually I guess it's been reconciled. This is a credit memo. And it looks like returns zeroed it out.

Q. Oh, I see; okay. Now --

(Thereupon, there was an off-the-record) discussion between Mr. Baker and Mr. Oldham.)

CONTINUATION BY MR. BAKER:

Q. Did you ever meet personally with Joe Vaughn?

A. Um, I think so.

Q. When was that, best of your recollection?

A. Um, I don't know.

Q. Okay. Was --

A. I — they came over to pick some tapes up, you know, so I don't, I don't really know.

Q. All right. Uh, when you say "they came over to pick up some tapes." who are you talking about?

A. The company.

Q. Okay. Uh, did you mean there was more than one person that came with him to pick up the tapes or just they, America's Parade of Homes?

A. Just they, America's Parade of Homes. I don't know who **[26] [30]** when it was entered into the computer.

Q. Okay. So all this stuff happened sometime before December the 5th and, uh, November the 30th, 1991? Is that fair, all the contact and the, uh --

A. Yes.

Q. — with America — okay.

A.. You're saying did everything happen before this date here?

Q. Yes.

A. Um --

Q. The production?

A. Yes, that's right.

Q. All right. Do you know what period of time before November the 30th?

A. No, I don't.

Q. Okay. This 1/6/92 date that's written on this invoice, what does that indicate?

A. That would have been when the deposit was put in our bank.

Q. Okay. So if the check was dated January the 3rd, 1992 for $1,160.50, you put it in on the 6th day?

A. That's right.

Q. Okay. All right. I understand.

A. Yeah. Sorry, I don't, I don't, I don't remember what that is. But that's all I can figure. I mean, that's our **[30]** stamp and --

Q. Okay. Um, you've got here "payment advance on video." What does that indicate? That the mon— that it was advanced sometime before?

A. Uh, that should mean, depending on what the other

information says, that that came in before the job was complete. When we do work for clients the first, for the first time, especially if it's a larger project, frequently we'll ask for an advance.

Q. I see. Okay. So the video wasn't complete as of this time, it was just, uh — and that's why you put it as an advance on your invoice?

A. Well, we would have billed them in advance. It looks like that, uh, we didn't finish — if it came in on 1/6, we would have invoiced them on 11/30 and, uh, we, we finished the revision on 12/23. So it came shortly after that.

Q. Okay. I see. Now, when you went to the Rogers store to do the videoing, uh, who, uh, — I don't guess you can just go without their permission, can you?

A. Uh, I don't think so.

Q. Okay. Who did you obtain permission from to go in and start videoing inside the Wal-Mart store?

A. We didn't obtain the permission; it would have been them **[31]**

[35] from the first one — and then depending on — uh, ever once in a whole someone will return them, but usually they'll just keep them and tell'em — tell us they need changes. We'll make the changes and then, uh, send out some other tapes. And, uh, we could have gotten it back but that's not common.

Q. Do you know when between 12/12/91 and 12/23/91 you were informed of what changes to make?

A. No, I do not.

MR. BASSAM: That's all I have.

MR. BAKER: A couple of follow-up questions.

REDIRECT EXAMINATION

BY MR. BAKER:

Q. Do you know Rick Johnson?

A. Uh, I don't recall.

Q. Okay. One way or the other?

A. One way or other, it's — oh, yeah.

Q. Okay.

A. I mean, all my "I don't recalls" are one or the other.

Q. Okay. Uh, what about, uh, Leta Harrison?

A. I don't, I don't know.

Q. What about Oleta Brock?

A. I don't know.

Q. Okay. Uh, do you have outtakes on all these, uh, videos that you did? [35]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

AMERICAN RELOCATION NETWORK INTERNATIONAL, INCORPORTED,	)	
Plaintiff,	)	
vs	)	No. 3-94-0938
WAL-MART STORES, INC.; A.W. LLAMA CORPORATION; WALTON ENTERPRISES II LIMITED PARTNERSHIP; AMERICA'S PARADE OF HOMES, INC.; and McNAUGHTON ENTERPRISES, INC.; D/b/a/ REAL ESTATE CENTRAL-McNAUGHTON,	)	
Defendants.	)	

DEPOSITION OF:

JOE VAUGHN

Taken on behalf of the Plaintiff

March 20, 1995

KYLE COURT REPORTING
Suite 301 - 212 Third Avenue, North
P. O. Box 198056
Nashville, Tennessee 37219
(615) 742-9209

(Attached #

FILED
U.S. District Court
Middle District
May 19, 1995
By D. DM
Deputy Clerk

EXCERPT FROM DEPOSITION OF:

VAUGHN - PAGES 42, 44, 94, 95, 99

(Attached #104)

sometime not too far into '92. I don't remember the exact date he started. Basically, we wanted to bring it in-house because Tim was an independent guy who had his own agenda about time frame and this, that, and the other. And we didn't have any control over Tim the way we needed.

Q. When they were in Fayetteville when they were representing the system, were they representing it as such you could be in one location and shop houses in another location?

A. No. There was probably some talk about that because I'm sure those kind of questions were asked. I think there was possibly some talk about, well, what technology would it take to do this, that, or the other. Frankly, most of the real estate people, that's one of the things they liked. Anybody that would get into this, that would be one of the normal questions that would come up.

A lot of people wanted to be able to have their listing around different places. It wasn't really a feasible option at the time.

Q. When you became involved with Tim, was that something you asked him to do was make it where you could shop from one place to another?

A. I don't know that we did. Basically, it was [42] pretty quick we got involved in it where we decided we weren't going do that. It wasn't a feasible - we brainstormed a lot of things. A lot of the things that have been said in these and

different things were brainstormed by different people. It is a kind of product everybody that sees it has an idea, do this and that. Different times and places, a lot of things were discussed. We never really seriously considered that as an option.

Q. If Tim says that's what everybody wanted from the get-go, is he mistaken?

A. Who is everybody? I think that was one of the original goals, sure, and still to this day, not to have them networked, but would be that you could at some point have the ability to access some kind of a database somewhere. We have never operated under that premise.

Q. Is that your testimony?

A. Yes, we have never put out a machine that was networked to any other machine other than something we could load a data file down from the office.

Q. Called a local area network?

A. No, no local area network.

Q. No kiosk you had out there ever hooked up to any other kiosk?

A. No. **[43]**

Q. They were all stand alone systems?

A. Absolutely.

Q. I want to make sure I'm clear on your testimony about what happened in the Fayetteville meeting. Is it your testimony it came up causally they were going to network the

system together?

A. My testimony is I don't remember what was said in that meeting specifically. At the time I was in that meeting, I was not looking at the system from a technical aspect. I'm not going to sit here and say this was said and that was said. I frankly don't remember. A lot of things could have been said.

I know a lot of the questions that were asked were asked from people in the real estate business because most of the reps we had were real estate people. I know that a lot of things were kicked around. To say that we said the word computer, I can't say that word was used.

Q. I'm not worried about what the audience said. I want to know what the presenters said.

A. I'm saying I don't remember what was presented specifically. I remember there was discussion. I don't remember any specifics about what was said, how it was done, how it was going to be done.

Q. Do you think people who were most concerned —

[44]

[93] Q. Do you know where Art Dixon's office was?

A. No.

Q. Who at Wal-Mart would have the authority to make that change, if anyone?

A. I don't know. If we did anything, we would send it to David, David Graham.

Q. Have you ever seen David Graham's handwriting?

A. I've seen his signature.

Q. Other than that?

A. I don't know if could recognize it if that's what you're asking.

Q. Who else at Wal-Mart did you have any contact with at any time?

A. The only other person besides David Graham that I ever had any contact with was somebody whose name I do not know in the advertising department who we had prepared a television commercial we were planning on using to promote when we were going in the cities. We took it to Wal-Mart to get their approval because it mentioned Wal-Mart in there.

When we got there, we went down to the Wal-Mart advertising department. There was a young man and lady in there whose names I do not know. We talked to them briefly. They got the vice president to walk **[94]** and look at this thing. He wouldn't look at it. He you will not advertise anything with Wal-Mart's on it period. Good bye. We left.

Q. Who was "he?"

A. Vice president of advertising.

Q. If his name was mentioned, would you recall?

A. I doubt it.

Q. You knew him to be the vice president of —

A. That 's the way he introduced himself or the way the

people who introduced him to us identified him.

Q. Who did that meeting take place with?

A. I'll be honest with you, I don't know.

Q. Do you recall who made the commercial — the video?

A. Who did the work on it?

Q. Yes.

A. It wasn't a video. It was a layout type of thing. Buck Jones Advertising Agency.

Q. In Memphis?

A. Yeah.

Q. When you say "layout" what do you mean?

A. Basically, he had drawn pictures of — he had written a script and had drawn pictures that would have — look like the screens might have looked — some of **[95]**

[98] Q. They did not.

A. Huh-uh (negative).

Q. Did you consider that a form of advertising?

A. Yes, I guess. What is a brochure. We didn't see it in general public-type situations like we were going to put a TV ad. We were using something that was going to be a sale between us and a potential real estate company or other type of advertising client. We couldn't get approval on that.

Q. When you said Jim and Ed, did you mean Jim McDonough and Ed Harwell?

A. Yeah. Jim probably did the lead part of it.

Q. Where did the picture of Wal-Mart come from?

A. I have no idea.

Q. How many times would you say you talked to David Graham from January of '92 when this thing started until you folded? You can characterize that on a weekly basis or monthly basis or however you best can --

A. I'm going to say I probably didn't talk to him on average maybe once every three or four months. That may be more than that.

Q. Would anybody else from APH other than yourself be authorized to call David Graham?

A. We didn't let just anybody. Jim could have. **[99]**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

AMERICAN RELOCATION NETWORK INTERNATIONAL, INC.	§	**FILED**
	§	**U.S. District Court**
	§	**Middle District**
	§	**May 19, 1995**
Plaintiff,	§	**By D.DM**
	§	**Deputy Clerk DE #105**
v.	§	No. 3-94-0938
	§	JURY DEMANDED
WAL-MART STORES, INC.	§	
A. W. LLAMA CORP.	§	
WALTON ENTERPRISES II LIMITED PARTNERSHIP	§	
AMERICA'S PARADE OF HOMES, INC. and	§	
McNAUGHTON ENTERPRISES, INC. d/b/a REAL ESTATE CENTRAL - McNAUGHTON	§	
	§	
Defendants.	§	

AFFIDAVIT OF ROSS OLDHAM

STATE OF TENNESSEE §

COUNTY OF SUMNER §
§

Personally appeared before me, a Notary Public, Ross Oldham, who, after being duly sworn, did depose and say:

1. That I am Ross Oldham and I am Executive Vice President of American Relocation Network International, Inc. These facts are based upon my own personal knowledge.

2. That I developed the ARNI system and have compared [1] the ARNI system and the APH system and the two systems are very similar and the APH system contain similar components and flows in substantially similar manner to the ARNI system which ARNI disclosed to defendant Wal-Mart and defendant Llama Corporation during our confidential discussions and meetings.

3. Sydney Thompson contacted ARNI and together we scheduled the meeting. Sydney Thompson had already received data from Leta Harrison. Sydney Thompson took extensive notes during an approximately one and one-half to two-hour meeting wherein plaintiffs fully disclosed their trade secret, business plan, method of operation, income potential, prospectus, and computer system. The only information not provided at the July 23, 1991 meeting was the specific technology and method to transmit the computer images in a cost effective manner. This cost effective transmission of images is a method of programming the software and the only method known to plaintiffs or that has been patented to date that can cost effectively transmit images such that an

economic gain could be realized on a state, nationwide or worldwide basis of transferring images. [2]

Further affiant saith not.

(Ross Oldham)
ROSS OLDHAM

Sworn to and subscribed to me
this 18th day of May, 1995.

Signature (Henry A. D sic)
NOTARY PUBLIC
My Commission Expires: Oct. 26, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

AMERICAN RELOCATION	§
NETWORK INTERNATIONAL, INC.	§
	§No. 3-94-0938
v.	§ JURY
	§ DEMANDED
WAL-MART STORES, INC.,	§
A.W. LLAMA CORP.	§
WALTON ENTERPRISES	§
II LIMITED PARTNERSHIP	§
AMERICA'S PARADE OF	§
HOMES, INC. and	§
McNAUGHTON ENTERPRISES,	§
INC. d/b/a REAL ESTATE	§
CENTRAL - McNAUGHTON	§
	§
Defendants.	§

AFFIDAVIT OF THERESA OLDHAM

STATE OF TENNESSEE	§
	§
COUNTY OF SUMNER	§

Personally appeared before me, a Notary Public, Theresa Oldham, who, after being duly sworn, did depose and say:

1. That I am Theresa Oldham and I am President of American Relocation Network International, Inc. These facts are based upon my own personal knowledge.

2. An understanding of the confidential nature of

all [1] contacts with the defendants was impressed upon all persons whom I came into contact with including Terri Bertschy, Becky Elliott, Curtis Barlow, Sydney Thompson, Dean Sanders, Mary Moreland, Leta Harrison, and Oleta Brock.

3. I took extensive steps in protecting the secrecy of ARNI's business plan and concept in all of our business dealings and took reasonable steps in protecting the secrecy of the project when we approached Wal-Mart, Inc., Walton Enterprises and Llama A.W. Corp. That I obtained assurances from all persons that I contacted with each defendant and that any information I forwarded was being sent in confidentiality and should remain that way and each individual I dealt with assured me that any information obtained would be held in confidence.

4. That ARNI's system in 1990 was an original concept and was a proven method of transmitting data. The ARNI concept included a national marketing plan revolutionary to the industry which would assist real estate agents and brokers nationwide in fulfilling their obligations to their clients to fully market properties. The ARNI plan contained a revolutionary method of marketing real estate directly to the consumer as well as to real estate agents and brokers.

5. The ARNI system was the only system in the world which had been developed that was a proven method at

the time of its [2] implementation. Plaintiffs did a United States patent search and could find no previous patents similar to plaintiffs' ideas and have done an additional United States patent search in 1994 and have still found no patents on this business plan, concept and software program.

6. Also, that the business plan and original concept were state of the art in 1990 and had not been pursued at that time at any level in the real estate industry even as high as the National Association of Realtors.

7. Becky Elliott referred me to both Charles Rateliff and Curtis Barlow during one of our telephone conversations; Becky Elliott transferred my call to Charles Rateliff's office and Terri Bertschy answered the phone. Terri Bertschy was then faxed a confidentiality agreement to which she agreed. Also, November 1990 Curtis Barlow requested, over the telephone, plaintiffs' business plans and prospectus which was forwarded. Further, other telephone calls were made to Mary Moreland and Mary Moreland stated to Theresa Oldham that Dean Sanders was looking at the information I had forwarded and that he would be presenting the information to the Board of Directors. I had several telephone conversations with Mary Moreland. Sydney Thompson referred me to Dean Sanders by providing his name and telephone number to the me. [3]

8. That upon receipt of the attached "Exhibit A" letter of Sydney Thompson, forwarded via United States

Mail, explaining that defendant Llama was unable to assess market penetration numbers since this was information which ARNI Corporation had researched, and was in possession of, I then directed the information to be forwarded to Llama Corporation in an effort to obtain venture capital for the ARNI Corporation and implementation of ARNI concept.

9. That once Wal-Mart began marketing or allowed marketing of a nearly identical system that had previously been proposed by ARNI Corporation, then ARNI Corporation, a very small corporation with a limited number of investors and investment capital, could not compete against Wal-Mart and their financial resources.

10. That I received that attached "Exhibit B" letter from Wal-Mart notifying me that Wal-Mart was not diversifying into this area.

11. That I have reviewed the patents attached to the Affidavit of Nicholas Alter and the first patent #4,734,769 which is a patent for a video display terminal and the method and apparatus on display of variable intensity pictures a video display terminal. This patent is just a video display terminal and does not even mention real estate. Patent #5,146,548 is a method for creating a MLS graphic book and is not related to the [4] ARNI concept in any way. Patent #5,235,680 is described as method of communicating data between computers for use by realtors and was not filed until September 17, 1991, after plaintiffs had been to Wal-Mart.

This patent is not the same as plaintiffs' trade secret as these patents were developed for use by individuals in the real estate industry as plaintiffs' trade secret and idea was a direct marketing to the consumer as well as to the real estate industry.

12. That the subject matter of ARNI's trade secret is not within public or general knowledge in the industry nor were they well known or easily ascertainable. The technology and expertise required to do the project could only be found in one company in this country at the time.

Further affiant saith not.

_____
THERESA OLDHAM

(This info not filled in on copy in Appendix)

Sworn to and subscribed to me
this _____ day of _____, 1995.

_____
NOTARY PUBLIC

My Commission Expires: _____

Llama
Company

July 24, 1991

Ms. Theresa I. Oldham
The Select-A-Home Corporation
One Northchase, Suite 250
Goodlettsville, Tenn 37072

Dear Theresa:

The interest of Select-A-Home in Llama is most appreciated. I reviewed your business plan and recognized, as I am sure we all do, that market penetration is the key variable. Llama does not have the capacity to independently assess the penetration numbers, whether by the large or small offering. As such, we cannot be of any assistance.

The real estate industry seems to always be behind the technology curve, particularly in consideration of the enormous capital dollars it moves around. I wish you luck in this and your other endeavors.

Best regards,

Sydney V. Thompson
Vice President

SVT:la

One Northern Plaza • Suite 302 • Fayetteville, Arkansas 72701 • (501)444-4000 • FAX#444-4018

WAL-MART

CONFIDENTIAL

WAL-MART STORES, INC.
CORPORATE OFFICES
BENTONVILLE, ARKANSAS 72716-0001

Sam M. Walton
Chairman of the Board
(501) 273-4210

October 5, 1991

Ms. Theresa Oldham
President
The Select-A-Home Corporation
One Northchase, Suite 250
Goodlettsville, TN 37072

Dear Ms. Oldham:

Thank you for your letter addressed to Sam Walton. He has requested that I respond for him.

Your proposal has been carefully reviewed. Although our company has experienced a great deal of growth in recent years, its focus is basically on retailing. We are experimenting with some new approaches; however, diversification is not the primary direction the Executive Committee or Board of Directors is taking at this time. Your request is most worthwhile, but I'm sorry it cannot be filled.

I hope you can appreciate the expansion that continues in our enterprise, the service and products we offer, the additional revenue being generated in communities we serve, and the employment opportunities we are trying to create.

Thank you for writing and giving Mr. Walton the opportunity to consider your request. We hope you are successful in attracting the interest you are seeking.

Sincerely,

Becky Elliott

Becky Elliott
Assistant

BE/wpa/dgl-3

REAL ESTATE INFORMATION CENTERS
POST OFFICE BOX 993 126 EAST MAIN STREET ATHENS, TENNESSEE 37310 TELEPHONE (615) 745-3930

July 29, 1992

Mr. Bruce Kirk
c/o KPHX-TV
1101 North Central
Phoenix, Arizona 85004

Dear Mr. Kirk:

I talked yesterday with Ms. Lisa Strocchio of your office regarding your interest in doing a short segment on our Real Estate Information Centers in the Phoenix area. Enclosed are the brochure and introductory video she requested.

I'll be happy to work with you on such a production. We expect to have some Centers installed in the Valley within 60 days, and any exposure the service could receive from you would be a help to everyone.

There are two requests I have, however. Your cooperation would be greatly appreciated. We have an obligation to Wal-Mart to portray our relationship in a certain manner, so we must exercise great care in publicizing the service. I need to be able to review the text of your program before it airs so we can help identify any potential problems in that regard.

Further, there is a segment of this video regarding "tieing the system together" that is often misunderstood. That aspect of the program should not be a part of anything you put together. Note also that we can't permit any of the video to be used directly in your production due to legal entanglements that could result.

Mr. Kirk, we're grateful and excited that you have an interest in our project. Please let me know how we can help and, certainly, we'd like to know when to look for the finished product.

Sincerely,

C. Michael Cain

C. Michael Cain
Director of Operations

LISA Strocchio
602 - 257-6630

Cain
Exhibit No. 1
Date 3/6/96

FILED
U.S. District Court
Middle District
Mar 29, 1995
BY: D.G
Deputy Clerk DE 70

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

AMERICAN RELOCATION NETWORK INTERNATIONAL, INC.	§
Plaintiff,	§
v.	§ No. 3-94-0938
	§ Judge Higgins
WAL-MART STORES, INC.	§ JURY DEMAND
A. W. LLAMA CORP.	§
AMERICA'S PARADE OF HOMES, INC. and	§
Defendants.	§

AFFIDAVIT OF CHARLES RATELIFF

I, Charles Rateliff, being duly sworn, make oath as follows:

1. I am the Senior Vice President-Benefits Administration of Wal-Mart Stores, Inc. In 1991, I was the Treasurer of Wal-Mart Stores, Inc.

2. I have personal knowledge of the facts set forth

herein.

3. I have not provided information of any type received from the plaintiff, American Relocation Network International, Inc., formerly known as The Select-A-Home Corporation, to anyone at America's Parade of Homes (APH).

4. I have not, and Wal-Mart has not, used any information received from American Relocation Network International, Inc. for any purpose. [1]

5. To the best of my knowledge, information and belief, no one at Wal-Mart provided information of any type received from the plaintiff, American Relocation Network International, Inc., to anyone at APH.

FURTHER, AFFIANT SAITH NOT.

Signature

CHARLES RATELIFF

STATE OF ARKANSAS)
COUNTY OF BENTON)

Sworn to and subscribed before me this 28th day of March, 1995.

(Anita M. Karren)
NOTARY PUBLIC

My Commission Expires:
2/1/2000

"NOTARY SEAL"
Anita M. Karren, Notary Public
Washington County, State of Arknasas
My Commission Expires 2/1/200

FILED
U.S. District Court
Middle District
May 19, 1995
BY D. DM
Deputy Clerk

EXCERPT FROM DEPOSITION OF:

EK - PAGES 8, 16, 18, 20-23, 27, 28, 31, 38

(Attached #104)

vendor number?

A. Six or seven numbers, and there is a hyphen between after the third number.

Q. All right. After the third number?

A. Uh-huh.

Q. So is this — do you recognize this 675-001 as being your handwriting?

A. Yes, it is.

Q. - And that's the vendor number for America's Parade of Homes?

A. That's correct.

Q. When did you assign that number?

A. The number would have been assigned just prior to issuing the first agreement.

Q. Are they done sequentially? That is, in order?

A. At that time it was not. the first three digits indicate the product code, the product that the vendor has.

Q. Okay.

A. And the other numbers are sequential. So that — the first three numbers were set up for real estate machine category.

Q. 675?

A. Yes.

Q. That means real estate machine?

A. And the 001 indicates that they were the first authorized vendor under that product code.

Q. Do you make a record when you sign a vendor number? **[8]**

MR. BAKER: She said there's only one 675 vendor.

MR. SMITH: Well, that's what I'm saying. I'll run every 675 just to make sure. I mean, I'll have them — I think it's only going to show one, but I'll even give you all the 675s.

MR. BAKER: I believe her testimony on that. I'm just — that's not the purpose in going through the documents, and you know that. We'll let the judge decide.

Q. (Mr. Baker continued.) Now, still talking about the procedure, the vendor number is issued, then you work on the agreement?

A. Correct.

Q. Does the agreement, is it supposed to have the vendor number in it?

A. Yes, it is. It usually follows the name of the individual or the business name.

Q. Okay. So, for example, in this January 6th contract here the vendor number has been assigned?

A. Yes.

Q. Okay.

A. This was the number assigned to America's Parade of Homes.

Q. All right. Now, can you tell me why there's no vendor number in that contract?

A. No, I can't.

Q. So that contract was not signed in the normal procedures **[16]...**

[17] Q. Okay

A. — is appropriate for the product.

Q. All right. So the only difference in this contract and the normal one is the way the rent is paid, so to speak?

A. Correct. Everything else is normal.

Q. Do you remember when you assigned the vendor number in this case?

A. Not specifically. It would have been just before the vendor agreements were issued.

Q. All right.

A. We don't assign a vendor number until we know that the vendor is going to be authorized.

Q. Okay. Do you make a record of when you assign a vendor number?

A. No.

Q. The date that it's assigned?

A. No.

Q. All right. So the vendor number is assigned, the contract is drawn up. If legal has to review it, they review it, and then is it sent back down to your office for getting the signatures?

A. Yes.

Q. Who handles getting the parties in to get the signatures?

A. In most cases we mail the vendor agreements out to be signed and witnessed. They don't come in. **[18]**...

[19] sometimes it comes back.

A. (Witness nods head.)

Q. Does Wal-Mart sign it before it goes out?

A. Yes.

Q. Okay, and who at Wal-mart in 1991 had authority to sign a vendor agreement?

A. Charles Rateliff.

Q. Is he the only one?

A. He's the only one that signed ours.

Q. Okay. Now, would you — how would that take place? Would you take it in there and say "Here, Charles, sign this. I'll witness it and I'll mail it out," or how was that handled?

A. Oh, when I do vendor agreements, I usually — normally I'll do several at a time. I'll put them in a green folder, and either I"ll take them down and leave them for the correct signatures or David Graham carries them down, and then somebody picks them up when they're done.

Q. Okay. Are they — how are they witnessed then? How do you witness the signature if you just carry them down there and let him sign them?

A. I sign them before they ever go down. That means I have reviewed the — made sure that everything is all right. Mr. Graham usually reviews them. Especially if there's any deviation from the standard 20 percent or whatever --

Q. Okay. **[20]**

A. — commission, and — because we want to make sure they're right when they go down.

Q. Okay. So you review them, David takes a look at them and reviews them, if they're okay you sign off as having witnessed them?

A. As the witness, yes.

Q. And then you carry them down to Charles Rateliff so he can sign them?

A. Yes.

Q. An then somebody --

A. Unless he's up in the office. Sometimes — I mean, at that point if he — he was in our office occasionally, and if he was up there, then he would sign them while he was there.

Q. I see. If not, you would leave them, and then somebody from his staff would bring them back down to you?

A. Or somebody from our staff would pick them up.

Q. Okay. Now, I want you to look here on the last page of this agreement, and can you tell me why you haven't signed off on that one?

A. No, I can't.

Q. Okay. So that document — was it prepared by you?

A. Yes, it was.

Q. When?

A. The 23rd day of July, 1991.

Q. Now, you looked at the document to get that date. Why did **[21]** you do that?

A. Because I date them the day I do them.

Q. Okay, and then do you also sign them that day?

A. Ordinarily.

Q. Okay.

A. Maybe a day.

Q. A day later or something?

A. Yeah. It depends if I'm doing 20 or 30 vendor agreements.

Q. Okay.

A. It may be the following day when I go through and check them all and sign them.

Q. You note the red stamp up there?

A. Yes.

Q. When is that added?

A. That means that was received in our office on that date.

Q. Do you not have a "received" stamp?

A. No. This is the way all of ours look.

Q. Okay. Let me show you this document. Do you recognize that as being a memorandum out of your office?

A. It's a standard form letter I sent out.

Q. Okay. You note the date has been blocked out on that?

A. Yes.

Q. Why is that?

A. Because I made a bunch of copies with a date on it, and rather than throw them away I blacked them out and put other **[22]** dates on it. This is a standard letter. I track all the insurance for all the vendors.

Q. Okay. What's that stamp at the bottom indicate?

A. I would — it's not our stamp.

Q. Okay. You don't know then?

A. I would imagine that was the vendor's stamp.

Q. Okay.

A. But it's not ours.

Q. I want you to look at this document, and do you remember preparing it?

A. Yes.

Q. When was --

A. I mean, I can tell that I did it on my computer.

Q. Okay. Who else has access to your computer?

A. Probably anybody in our department, but we each have our own so --

Q. Are they networked together or are they standing alone? In other words, can I send a message from mine to yours?

A. There's a — yes, if we put it on a public drive.

Q. Okay.

A. If you're wanting to know is this document available on every computer in our department, no.

Q. Just yours?

A. Unless I have given it to somebody for some reason.

Q. Okay. Is your computer secure? In other words, do you **[23]...**

[25] explain the absence of your own signature?

A. Charles had to have been standing right there.

Q. Okay. When it was done?

A. (Witness nods head yes.)

Q. And then you would have mailed this out?

A. No, I wouldn't have mailed it out.

Q. Why is that?

A. If they all signed it in the office, it wouldn't have been handled through mail.

Q. And how do you explain the fact that it's got a date received of about three weeks later if it wasn't received back in the mail?

A. Well, I cannot do that.

Q. Okay. That's an unusual document, isn't it?

A. Again, I just — I have to guess that it was signed in the office, but the date stamp does indicate that it came back in the mail.

Q. Okay.

A. I don't — I don't know why it wasn't witnessed.

Q. Okay.

A. I wasn't aware that it wasn't. It would be rare that that happened.

Q. Okay. Now, when you send out one of these vendor agreements for signature through the mail with the cover letter, do you maintain a copy of that cover letter in your file? **[27]**

A. Yes.

Q. So if this document was sent out in the mail, there would still be a cover letter in the file?

A. Yes.

Q. You wouldn't purge them?

A. No.

Q. Now, when you mail these out, what kind of envelope do you put them in?

A. A large one.

Q. A large one?

A. One that holds it without folding it.

Q. Okay.

A. First class. They're marked first class.

Q. And do you send an envelope for them to be returned in?

A. No.

Q. So it's up to the vendor to place it in an envelope and return it to you?

A. Right.

Q. Do you keep those envelopes when they come back?

A. No.

MR. BAKER: We want to get the file and then we'll — if she can get the file, let's look at the file. Then we'll go from there.

(Wherein a break was taken.)

MR. BAKER: Back on the record. **[28]**

[30] Q. Okay. Do you know Keith Jensen?

A. No.

Q. Let me have the file back there so I can ask you some more questions about it. We might have to pass it back and forth a couple of times. These two contracts the one dated July 23, 1991, and the one dated January 6th, 1992, they belong in this file. Right?

A. Yes. They go in the folder with the insurance form.

Q. I'm going to put them back in here where you told me that they go. Now, do you know when this document entitled "Arkansas Electronic Resource Center" was received by your office?

A. No, I don't.

Q. Is it normal procedure to stamp file something when it's received?

A. If it came in the mail.

Q. Okay. What if it's hand-delivered?

A. No.

Q. All right. That's all I want to ask you about that. This

a vendor query that you did back at the office just a moment ago?

A. Yes, it is. I queried product code 675.

Q. Real estate.

A. (Witness nods head yes.)

Q. And no vendors were found?

A. That's correct. **[31]**

[37] Q. Who did you understand his partners to be?

A. Joe Vaughn, and I don't know what the other one's name is right offhand.

Q. Jim McDonough?

A. Yeah, Jim.

Q. All right. Now, do you remember when that prototype was brought?

A. I don't know the exact date. It was brought before any were put into the stores.

Q. It was brought before they were put in the stores?

A. Uh-huh.

Q. And this letter dated September 11th, 1991 authorizes three stores?

A. Uh-huh.

Q. That's the first three stores, I guess, that they were put in? Do you know?

A. That's correct. **[38]**

Q. That was September 11th, 1991?

A. That's correct.

Q. So the prototype was brought in sometime before that?

A. Correct.

Q. Okay. Have you ever met Jim Vaughn or — excuse me. Joe Vaughn or Jim McDonough prior to the time they brought the prototype up?

A. I don't think so. **[38]**

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED
U.S. District Court
Middle District
Mar 29, 1995
BY DGR
Deputy Clerk

AMERICAN RELOCATION NETWORK INTERNATIONAL, INC.	§
Plaintiff,	§
v.	§ No. 3-94-0938
WAL-MART STORES, INC.	§JUDGE HIGGINS
A. W. LLAMA CORP.	§
WALTON ENTERPRISES II LIMITED PARTNERSHIP	§JURY DEMAND
AMERICA'S PARADE OF HOMES, INC. and McNAUGHTON ENTERPRISES, INC. d/b/a REAL ESTATE CENTRAL - McNAUGHTON	§
Defendants.	§

DE 68

AFFIDAVIT OF DAVID M. GRAHAM

I, David M. Graham, being duly sworn, make oath as follows:

1. I am the director of the Other Income division of Wal-Mart Stores, Inc.

2. My division is responsible for working with vendors such as America's Parade of Homes (APH).

3. We received a proposal to place automated real estate selection centers in our stores from APH on May 28, 1991.

4. It was decided on May 29, 1991, to test market the proposal and decided on June 4, 1991, to call Mr. Edwin Harwell of APH to set up a meeting. As a result of that meeting, we agreed to test market the centers. [1]

5. I had never heard of American Relocation Network International, formerly known as The Select-A-Home Corporation, prior to the filing of the initial lawsuit in April of 1993. I did not provide information of any type received from the plaintiff.

6. I have not, and Wal-Mart has not, used any of the information received from American Relocation Network International, Inc. for any purpose.

7. To the best of my knowledge, information and belief, no one at Wal-Mart provided information of any type received from the plaintiff, American Relocation Network

International, Inc., to anyone at APH.

8. The automated real estate selection centers provided by APH have been in operation in certain Wal-Mart stores since the fall of 1991.

FURTHER, AFFIANT SAITH NOT.

Signature
DAVID M. GRAHAM

STATE OF ARKANSAS)
)
COUNTY OF BENTON)

Sworn to and subscribed before me this 27th day of March, 1995.

(Anita M. Karren)
NOTARY PUBLIC

My Commission Expires:

2/1/2000

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY

AMERICAN RELOCATION NETWORK INC. INC.

Plaintiff,

v.

WAL-MART STORES, INC. ET AL.

Defendants.

FILED
U.S. District Court
§ Middle District
§ Mar 24, 1995
§ By ____
§ Deputy Clerk
§
§ Exhibit 2
§ No. 93-1106-II
§
§
§
§

AFFIDAVIT

Morris E. Harwell, Jr., of full age and being duly sworn, based on personal knowledge and belief, deposes and say:

1. I am the Chairman of the Board of Directors of American Parade of Homes, Inc., a Delaware corporation with its principal place of business at 726 East Main Street, Adamsville, McNairy County, Tennessee, 38310. I have read the Complaint filed by American Relocation Network Inc. in cause # 93-1106-II filed in the Chancery Court of Davidson County, Tennessee.

2. The original concept for our company was developed prior to 1988 by myself. This concept was developed independent of Wal-Mart or any of the defendants

or plaintiff. The concept presently being used in the Wal-Mart Stores was developed prior to meeting with any representative of Wal-Mart or any of the defendants.

3. Wal-Mart did not make any recommendations as to the type of product or services we offered or as to the manner in which such product or services would operate. I was the principal representative who communicated with Wal-Mart representatives pursuing the contract at issue.

4. I entered into a contract on 4 June 1991 with Wal-Mart to test market the system at issue. This contract was entered into prior to the date the plaintiff alleges to have first met with a Wal-Mart representative.

5. There are in fact other competitors through out the United States that use a system much like ours.

6. No one with Wal-Mart (or any other defendant) ever identified plaintiff nor did they ever identify any products or services allegedly provided by plaintiff.

7. In my dealings with Wal-Mart, the only references by Wal-Mart (or any other representative of any defendant) to other possible vendors or services which were at all similar to ours [1] was an uneventful comment by a representative of Wal-Mart that Wal-Mart had considered two other possible sources but found them to be unacceptable.

8. My company is a tenant of Wal-Mart. We lease space in Wal-Mart Stores to place our systems in a kiosk arrangement. We only pay rent to Wal-Mart. There are no

other financial incentive with revenues to Wal-Mart other than rent.

9. The vast majority of the locations where our system is in operation are in Wal-Mart Stores. Issuance of the injunction would put our company out of business. It would cause an irreversible business failure. Though it is uncertain whether our non-Wal-Mart customers would continue to use our system, even if they did, such would be inadequate to maintain the financial obligations of our company. Issuance of the injunction would constitute a breach of contracts with all of other customers, not limited to those pertaining to Wal-Mart Stores.

10. The activity plaintiff seeks to enjoin is the only business product or services offered by American Parade of Homes, Inc. If the injunction is issued, we will have no choice but to layoff must of our employees because there is no other or additional service they can provide.

Signature

Morris E. Harwell, Jr.

Subscribed and sworn to before me
this 29th day of April, 1993.

Joyce M. Song

Notary Public

My Commission Expires: July 10, 1996
I hereby certify that this is a true copy or certified instrument filed in my presence This 17th day of March, 1995.
Claudia C. Donnyman, Clerk and Master
By Regina Zuayle (sic)
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

FILED
U.S. District Court
Middle District
Aug 01, 1995
By: D. DM
Deputy Clerk

AMERICAN RELOCATION NETWORK INTERNATIONAL, INC.	§	
Plaintiff,	§	
v.	§	No. 3-94-0938
1.	§	JURY DEMAND
WAL-MART STORES, INC.	§	
A. W. LLAMA CORP.	§	
AMERICA'S PARADE OF HOMES, INC.	§	
Defendants.	§	

PLAINTIFF'S RICO STATEMENT

Comes now the plaintiff, by and through counsel, and responds to the Order of the Judge for a RICO statement.

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c) and/or (d).

RESPONSE: The unlawful conduct is violation of 18 U.S.C. 1962 § C violation.

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

RESPONSE: Defendant Wal-Mart obtained plaintiffs' business plans following telephone conversations between the parties when Wal-Mart agents requested that the information be forwarded. These conversations took place while the defendants were in Arkansas and the plaintiffs were in Tennessee. Plaintiffs forwarded the requested information through the United States mail. Defendant Llama is an investment banking company who [1] scheduled an appointment with plaintiffs to discuss plaintiffs' business plan. Defendants Llama scheduled an appointment on the telephone with plaintiffs. Plaintiffs traveled to Fayetteville, Arkansas, met with representatives of defendant Llama and disclosed their trade secrets in an attempt to obtain equity financing. The defendants Wal-Mart and Llama in concert obtained the necessary elements of plaintiffs' trade secrets sufficient to establish the trade secret for themselves. Defendant America's Parade of Homes allegedly created by Edwin Harwell was an enterprise established to implement plaintiffs' business plan in the Wal-Mart Stores.

3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

RESPONSE: Sydney Thompson - employed by Llama - met with plaintiffs and requested significant and detailed disclosure of plaintiffs' trade secrets.

4. List the alleged victims and state precisely how each victim was allegedly injured.

RESPONSE: American Relocation Network International, Inc. is the victim of the wrongdoing. Plaintiffs have suffered the disclosure of their trade secret, have lost capital outlays in the development of the trade secret, have suffered loss of profits and loss of competitive advantage.

5. Describe in precise detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering shall [2] include the following information.

(a) List the alleged predicate acts and the specific statutes which were allegedly violated;

(b) Provide the dates of the predicate acts, the participants in the predicate acts and a description of the facts surrounding the predicate acts;

(c) If the RICO claim is based on the predicate offenses of wire fraud, mail fraud or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Identify the time, place and contents of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;

(d) State whether there has been a criminal conviction for violation of the predicate acts;

(e) State whether civil litigation has resulted in a judgment in regard to the predicate acts;

(f) Describe how the predicate acts form a "pattern of racketeering activity"; and

(g) State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.

RESPONSE: (a) (b) (c) Plaintiff contacted Becky Elliott, Assistant to Sam Walton, on the telephone in March 1991. Becky Elliott requested that a business plan be forwarded to Sam Walton's office which plaintiff did via U.S. mail. Since plaintiffs allege the business plan was fraudulently **[3]** misappropriated, a violation of 18 U.S.C. § 1341 (mail fraud) occurred.

In July 1991, defendant Llama, through Sydney Thompson, obtained plaintiffs' business plan and scheduled a meeting by telephone with plaintiffs' principals. Plaintiffs' principals traveled to Fayetteville, Arkansas and met with Sydney Thompson in an effort to obtain equity financing. Then defendant Llama obtained the "sum and substance" of plaintiffs' business plan during this meeting. The telephone call placed to plaintiffs amounts to wire fraud since the purpose of the call was to defraud plaintiffs of their trade secrets in violation of 18 U.S.C. § 1343 (wire fraud).

On July 23, 1991, plaintiffs traveled to meet with defendant Llama. On July 24, 1991, defendant Llama caused a letter to be sent to plaintiffs via U.S. mail which suggests that plaintiffs provide certain information to support their prospectus. This information was used by defendants to understand plaintiffs' business plan and confirm its potential. This information was fraudulently obtained by defendant Llama in violation of 18 U.S.C. 1341 (mail fraud).

Additional phone conversations were held between plaintiffs and defendants wherein defendants told plaintiffs they were looking at the project but did not have a response on whether defendant would be interested in plaintiffs' business plan.

On October 14, 1991, defendant Wal-Mart caused a letter to be sent to plaintiffs by U.S. mail which advised plaintiffs Wal- [4] Mart would not be interested in diversifying into the field in which plaintiffs proposed. This was an obvious misrepresentation since Wal-Mart had authorized the co-conspirator Edwin Harwell (APH) on September 11, 1991, that he could set up the plaintiffs' business plan in Wal-Mart Stores. This fraudulent misrepresentation is a violation of 18 U.S.C. § 1341 relating to mail fraud.

(d) None.

(e) No.

(f) Attached hereto is a similar case styled Creative

Demo's v. Wal-Mart.

In Court III, the plaintiffs alleged that defendant engaged in fraudulent conduct by obtaining plaintiffs' business plan from plaintiffs, then converting those plans to their own use. The events supporting the allegation occurred in 1991 during the same time period in which defendants were requesting plaintiffs' business plan. With some small changes, the allegations in Count 117 of the Amended Complaint mirrors the facts that are alleged in this case.

(g) The predicate acts as delineated in 5(a)(b)(c) above are a part of a common plan to obtain plaintiffs' trade secrets and business plan. Once the business plan was obtained, defendants then implemented plaintiffs' business plan under the guise of a separate corporation, namely America's Parade of Homes. **[5]**

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

(a) State the names of the individuals, partnerships, corporations, associations or other legal entities which allegedly constitute the enterprise;

(b) Describe the structure, purpose, function and course of conduct of the enterprise;

(c) State whether any defendants are employees, officers or directors of the alleged enterprise;

(d) State whether any defendants are associated

with the alleged enterprise;

(e) State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

(f) If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments or victims of the alleged racketeering activity.

RESPONSE: (a) Charles Rateliff, employee of defendant Wal-Mart; Sydney Thompson, employee of defendant Llama; Ed Harwell as America's Parade of Homes.

(b) The enterprise included Wal-Mart, Llama and defendant America's Parade of Homes. The purpose of the enterprise was to obtain plaintiffs' business plan and trade secret, obtain the **[6]** details of the business plan insofar as how it would function and obtain supporting documentation to support the business plan. This enterprise was carried out via the United States mail and over the telephone to obtain the documents which supported the earning potential and plaintiffs' business plan and trade secret.

(c) No officers or directors are named as defendants.

(d) The defendants Wal-Mart and APH are associated with the alleged enterprise. The defendant Llama assisted in obtaining details of the plaintiffs' trade secrets.

(e) The defendant APH is the enterprise itself and the

defendants Wal-Mart and Llama are members of the enterprise.

(f) The defendants are perpetrators of the enterprise.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

RESPONSE: The defendants Wal-Mart and Llama are associated in fact as both are under the management of the Walton family. The defendant Wal-Mart and defendant APH are also associated in fact by agreement entered into on January 6, 1992. The enterprise's activities of defrauding a Tennessee corporation of their trade secrets and business plans affect interstate commerce.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering [7] activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

RESPONSE: The enterprise used a scheme of obtaining plaintiffs' business plans via U.S. mail and over the phone to obtain information to establish a similar business plan as that of ARNI. The pattern of activity in this claim is extremely similar to the activity in the Creative Demo's v. Wal-Mart Stores, Inc. case. The activities of this enterprise do not appear on its face to be the usual and daily activities of defendant Wal-Mart other than the case referenced above. Plaintiffs do not have enough information regarding

defendant Llama to state that the defendant Llama engages in fraudulent conduct as a regular part of their business.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

RESPONSE: Defendants obtained the plaintiffs' business plan and trade secrets. The defendants then attempted to market plaintiffs' business plans and each defendant received income from their efforts.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

RESPONSE: Some of the effect on interstate commerce was the fraudulent obtaining of the information and the resultant loss of profits to the ARNI Corporation which was to be multi-state **[8]** venture. In addition, defendants Wal-Mart and APH attempted to make the venture a multi-state listing service. The defendants Wal-Mart and APH earned income from the enterprise on a multi-state basis.

11. If a violation of 18 U.S.C. § 1962(a) is alleged, provide the following information:

(a) State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

(b) Describe the use or investment of such income.

RESPONSE: Not alleged.

12. If a violation of 18 U.S.C. § 1962(b) is alleged, describe in detail the acquisition or maintenance of any

interest in or control of the alleged enterprise.

RESPONSE: Not alleged.

13. If a violation of 18 U.S.C. § 1962(c) is alleged, provide the following information:

(a) State who is employed by or associated with the enterprise; and

(b) State whether the same entity is both the liable "person" and the "enterprise" under § 1962(c).

RESPONSE: (a) The persons associated with the enterprise include:

Edwin Harwell - alleged founder of APH;
Charles Rateliff - employee of Wal-Mart;
David Graham - employee of Wal-Mart;
Sydney Thompson - employee of Llama. **[9]**

They are all associated with the enterprise.

(b) The liable party and the enterprise are separate and distinct.

14. If a violation of 18 U.S.C. § 1962(d) is alleged, describe in detail the alleged conspiracy.

RESPONSE: Not alleged.

15. Describe the alleged injury to business or property.

RESPONSE: The injury includes lost profits, loss of earnings, loss of market share, loss of competitive advantage, loss of trade secret.

16. Describe the direct causal relationship between

the alleged injury and the violation of the RICO statute.

RESPONSE: Once defendants fraudulently obtained plaintiffs' business plans and trade secrets, they attempted to implement the plan. Defendants also disclosed plaintiffs' trade secret at real estate trade shows and to other Realtors. The disclosure and conversion of plaintiffs' business plan caused plaintiffs to lose approximately four years operating income, loss of developmental costs and competitive advantage.

17. List the damages sustained for which each defendant is allegedly liable.

RESPONSE: The defendants Wal-Mart, Llama and APH are jointly liable to plaintiffs for their developmental cost which are approximately $220,000.00, their loss of earnings exceeding **[10]** $10 million and loss of market share and the destruction of plaintiffs' trade secret.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

RESPONSE: None.

19. List all pendent state claims, if any.

RESPONSE: Fraud, breach of confidential relationship, misappropriation of trade secrets, constructive fraud, conversion of business property, breach of contract.

20. Provide any additional information that you believe would be helpful to the Court in processing the RICO claim in this action.

RESPONSE: Plaintiffs believe this is complete.

Respectfully submitted this 31st of July, 1995.

GILREATH & ASSOCIATES
SIDNEY GILREATH
RICHARD BAKER
550 MAIN AVENUE,
SUITE 600
P.O. BOX 1270
KNOXVILLE, TN 37901-1270

Richard Baker (signature)
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing was furnished as follows: [11]

Mr. Richard Smith
PARKER, LAWRENCE,
CANTRELL & DEAN
200 Fourth Avenue, North
5th Floor, Noel Place
Nashville, TN 37219

Mr. Joe Vaughn
APH
726 East Main Street
Adamsville, TN 38310

by mailing, postage prepaid, or by delivery to the person or office of such counsel.

This the 31st day of July, 1995.

BY: Richard Baker (signature)
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED
U.S. District Court
Middle District
Mar 24, 1995
BY_____
Deputy Clerk

AMERICAN RELOCATION NETWORK INTERNATIONAL, INC.	§
Plaintiff,	§
v.	§ No. 3-94-0938
WAL-MART STORES, INC. A. W. LLAMA CORP. WALTON ENTERPRISES II LIMITED PARTNERSHIP AMERICA'S PARADE OF HOMES, INC. and McNAUGHTON ENTERPRISES, INC. d/b/a REAL ESTATE CENTRAL - McNAUGHTON	§
Defendants.	§

Deposition of:
THERESA INEZ OLDHAM - VOLUME I
March 6, 1995

Kelli Isaball, Accurate Court Reporting
530 Third Avenue South, Suite, Nashville, TN 37210

[34] ... then we changed it and went to Northchase. Actually,

it was Northchase's lounge facilities and corporate rooms before we even rented our space there.

Q. Okay. Are you the individual who came up with the idea or the concept -- and we can use whatever term you are more comfortable with -- that we have generally referred to as the ARNI System in this lawsuit and the previous lawsuit in Chancery Court, or did someone else assist you in coming up with the idea or the concept, or whatever you want to call it?

A. I did, but with someone else present.

Q. Okay. When was that, and who else was present?

A. Linda Weber was present.

Q. Okay.

A. Her name at that time was Linda Atha. She -- it was 1984, I believe, January.

Q. Was that on the airplane?

A. No. I met her on the airplane in '82.

Q. Okay. Explain, then, what happened in 1984, where you were and what you and Linda Weber did when you came up with the concept.

A. Okay. I was in her den and the reason [**35**] that we came about the whole idea -- I came about the whole idea -- was because she, in Oklahoma, she is a broker in Oklahoma, and the manner that they marketed their real estate in amazed me, because it was so back-driven that I was disappointed that our profession was still marketing in that

manner.

And I had been using the MLS booklet, regular MLS book, plus -- and she had nothing like that. What she had only was a printout of the list of properties that were available in that area, and that list she was looking at, showing me what properties she had listed. Because she was a top producer in the listings also, and so she was showing me what she had listed, and I said, I cannot believe this. How do you show the people the property? Because There is a lot of farm area and ranches and so forth, and she said that the -- we either have to take a photo of it ourself to show the people or take them to the property. Well, if you take people to the property in a country area like that and ranches and so forth, you're going to spend an awful lot of time. And I knew that that just was not -- that just wasn't satisfactory.

Q. What was your idea?

[36] A. So I told her, I said, Well, what is needed and what we need to do, I said, is put a computer system, a video real estate computer system together that will cover around the world plus — nationally and locally. That way you could see pictures of the home, you know, like the MLS would have, only you can go more intensely into it and see the homes anywhere you wanted to, or locally.

Q. I think you said that she was in Oklahoma and did not have the benefit of the Multiple Listing Service?

A. Now, I didn't say that. I said what she didn't have

was the MLS books with the pictures in it. All she had was a printout listing of listings that were available.

Q. Okay.

A. Which is --

Q. She did not have the MLS book?

A. Oh, no, they didn't even print one.

Q. In Oklahoma?

A. In the area she lived, they did not print one.

Q. But they did in the Nashville area, where you were from in '84?

A. Oh, yes.

[139] Q. All right. Do you have any idea where that document is?

MR. BAKER: I think there's a copy of it in that stack.

MR. CLEMENT: Okay.

MR. BAKER: It's in that stack. I'm sure it is.

THE WITNESS: Now, that date on there, on that, the dates, you know, I'm not sure of the dates on all of this stuff. I know the date is right on there, because it was faxed.

Q. (By Mr. Clement) It says September 10, 1990?

A. Yeah.

Q. So you think that is a correct date?

A. That is a correct date.

Q. Obviously, you would have spoken with Terry Muncey at ECS prior to this to get a presentation?

A. We did.

Q. When did you first start speaking with Mr. Terry Muncey or ECS?

A. This has to do with Ross and Bruce.

Q. What do you mean, it "has to do with Ross and Bruce"?

[142] a contract after, but I had him to send me the proof he could do what he said and a resume and what he could do and the equipment he could put together to do it.

Q. Well, did he tell you that the technology was there to do what you wanted to do?

A. He knew and could furnish the technology to do this.

Q. Okay. Did he mention that others were already using video?

A. No.

Q. He didn't?

A. He did not, and he did not mention anything that had to do with it being available even to the market at all, period.

Q. Is it your position that in 1990 nobody was using video on computers?

A. Yes. There was nobody that I knew of that was.

Q. Okay. So the cutting edge of technology that you are speaking of, one important element of it is the idea of putting video on a computer monitor, is that correct, in 1990?

A. To market real-estate-related services.

Q. Well, you knew in March of 1990 and before [143] that, that others were using video on computers. They may or may not have been using real estate, to your knowledge, but you know that others were using —

A. Who?

Q. -- video to display information or graphics or pictures on computer monitors?

A. No, I did not.

Q. You didn't have a clue?

A. No. The only thing that I saw was just the printout, typing.

Q. And you were part of the diligent —

A. There was no other.

Q. You were part of the diligent search for technology from '84 through '90 by going to libraries and buying books at bookstores and getting magazines, and you had never, ever seen prior to March of '90 any computer monitor with a video display on it?

A. No.

MR. BAKER: And I think she means real estate, and you mean display.

Q. (By Mr. Clement) I'm not limiting it to real estate. We've already ruled out real estate, and I'm now talking about anything. Pictures of dogs [144] or pictures of people or pictures of buildings or pictures of bridges or whatever.

A. My concern was how we could put this computer together to do what we wanted it to do, and I was looking for something that was flexible enough that we could do exactly what our plan was to do, and there was none, as far as I knew, that was available to do that. In my understanding even today, there wasn't.

Q. And my question is --

A. I didn't see any, no.

Q. And you didn't hear of any?

A. No.

Q. You didn't know of any?

A. No.

Q. And none showed up in the magazines and the books and articles and all the research —

A. I never saw anything.

Q. -- you have done for six years?

A. I have never saw anything there.

Q. Okay. Let's go back a little bit. We got off track some. In '87 you involved your son Ross in the idea, and then we jumped to 1990 when you met with Mr. Kirby in Nashville. And you did -- we did talk about some phone conversations with him prior

[292] yes.

Q. You came up with the idea to put that type of information on a computer monitor?

A. To market it in a manner to where people

would not have to spend the time and the money, having to go around and spend hours of — wasted hours of time.

Q. Right. Okay. And that's what you are upset with APH about, and that's what you are upset with the Board of Realtors about, is that they are putting that information on a computer monitor?

MR. BAKER: I object to the form.

Q. (By Mr. Clement) Is that correct or incorrect? Is that what you are upset with APH?

A. They are marketing in a whole different manner that they never marketed before, and it is the manner that I took to them.

Q. What is the manner that they are marketing it in?

A. In the kiosk or in the computer, they are marketing where that people can go to the computer and see the real estate and pick out the areas they want or whatever services they want and get a printout to know something about the property without having to look at an MLS book or have to go

[395] Q. But you just told me earlier you didn't take any courses on computers.

A. Nothing except that PRC.

Q. Okay.

A. That's why I keep referring you to the technical.

Q. Now, I don't really want to rehash over and over and over again the idea. I'm sorry, the concept. You didn't like the word "idea," the concept that you keep talking about. But as we went through this, my perception was that what you considered to be the concept is putting all of these services into a computer screen that a customer can pull up and have access to. Is that what you're — is that your basic concept?

A. It is a still video imaging screen that can show properties in a certain length of time to where people can search for real estate and related services much faster without having to spend time running all around the creation with the realtors seeing a lot of houses they don't want to see.

Q. Then, is it your testimony that nobody was putting any information on still videos, on computers? I'm not talking about just real estate but in any area.

]426] give it to Sam, and I asked her how we could get a hold of Alice Walton to present it to her. And she said, Well, if you want to present it to her, she said, Then you need to call Walton Enterprises.

Q. So, again, she didn't refer you to Walton Enterprises. You asked her how to get a hold of Alice Walton?

A. And she referred me, or I wouldn't have known how to get a hold of her.

Q. To me referral means that you all and say, I've

got this program, and they say, Well, the person you need to talk to is Alice Walton. That's not what happened. You asked for Alice Walton.

A. I asked for her there at Wal-Mart.

Q. And she told you --

A. She told me how to get in touch with Alice Walton, to present it to her, and when I called there, Oleta called later, Syd, and sent our packages to Syd and had Syd to call us to come down.

Q. So this is in March of '90 you talked to — at that time did you get from Becky to call Alice Walton in March of 1990?

A. It was in — I would have to go back and look at our calendar of events right now on this.

Q. Because you didn't contact — you talked **[427]** to --

A. When I contacted --

Q. You talked to someone at Wal-Mart in March of 1990, you said, and then the next contact was in November?

A. November, uh-huh, yeah.

Q. So did you ask her in March how to get a hold of Alice Walton?

A. I believe it was November.

Q. Okay. And after March of 1990 you said you sent a blue binder. Did you ever hear anything back from

them at that point?

A. No.

Q. So then in November of 1990 — what happened in November of 1990?

A. I called.

Q. You called Wal-Mart again?

A. Uh-huh, and talked to Becky Elliott and wanted to talk to Sam again and asked about our package. And, again, he wasn't there, and, again, she said, you know we could send it, because I told her we had other information too.

Q. Did she remember your conversation from March?

A. Evidently, because we carried on a **[428]** conversation.

Q. Okay. What I'm saying is did she refer to the March 1990 telephone conversation?

A. I mean, I referred to her as soon as I called, and I told her who I was.

Q. Okay. Did she say the same thing in November of '90 that she said in March of '90, that if you want Mr. Walton to see anything, send this prospectus and we'll look at it?

A. I told her I sent the package and hadn't heard anything back, and she said, If you want to send another package, you can. And I told her, Okay, I would send another

package, and I did.

Q. She didn't say anything about recalling that she had even received the first package?

A. I didn't receive the package back.

Q. No, she received the package.

A. She received the package, and I didn't get it back, and so evidently she must have gotten it even though she didn't call me, because I never got anything back.

Q. Did she say she received the package?

A. I just told her, I sent you a package back then from our conversation, and I have not heard from you, and I'm making a return call on it.

[437] still confidential, and she said, Go ahead and send it and she would see they have it. She said she did mention that they were really in -- really kind of looking at enlarging more stores, adding more stores, more than going into other projects but that -- go ahead and send it, and they would keep it confidential, and that she would show it to Sam.

Q. Okay.

A. She also -- I asked her, also, who I could contact besides Sam since he wasn't there, and she told me.

Q. What did she tell you?

A. She told me that I should talk to Charles Rateliff the treasurer, and I should talk to Curtis Barlow, which was executive vice president over real estate, and I talked to both of them, and I faxed materials to both of them.

Q. When did you talk to them? Let's start with Charles. When did you talk to Charles Rateliff?

A. I did not talk to Charles. I talked to his assistant, Terri Bertschy, and faxed her a nondisclosure, and she read it and agreed to it, even though she didn't sign it and send it back, she did agree to it.

[438] Q. That was in a phone conversation with you?

A. Yes.

Q. What did she say?

A. She just told me that they would be glad to look over the materials and consider them, and she would see that Charles Rateliff got to look over them. And I asked her about Curtis Barlow also, and she told me that I could talk to him, and I did.

Q. Did you talk to Ms. Bertschy more than once?

A. Yes, I talked to her more than once. Because the first time I talked to her, I sent her a fax of nondisclosure.

Q. Do you remember when that was?

A. It was -- the exact date in November, I can't tell you without referring back to my notes, but it was in November, yes.

Q. November of 1990?

A. Yes, 1990.

Q. Okay. Now, let's start with the first conversation. I don't want to get them confused. Now, what did you say, and what did she say in the first conversation?

A. In the first conversation I told her that I had talked to -- tried to call Sam Walton and talked [439] to Becky Elliot and Becky Elliot had referred me to Charles Rateliff and that it was confidential, and I wanted to tell her -- I wanted to talk to Mr. Rateliff about our project since Sam Walton wasn't in. And they referred me to Charles Rateliff and so she said that she would be glad to talk to me for Charles Rateliff and that I could send something, you know, to her. And I told her I couldn't send it unless she agreed to confidentiality, and she said okay, and I told her that I would fax her a nondisclosure, which I did. And then I talked to her after that and she said, I'm not going to sign the nondisclosure, but I will agree to it.

Q. Okay. How long between the first and second conversation?

A. Again, if you look at the phone bill, it will show you. It's on the phone bill.

Q. Do you think it was a couple days or the same day?

A. It was either the same day or the following day, and I believe it was -- well, I'm not going to say, either the same day or the following day.

Q. Did you call her the second phone call, or

[455] A. I would have to go back to the phone bill to find out the date, the approximate date. I couldn't tell you the exact dates.

Q. Was it in this same time period, or did you wait

until 1991?

A. I don't think so. I think it was 1990.

Q. Do you remember who you talked to there?

A. Oleta.

Q. Tell me about that conversation.

A. She said that -- I asked her about it, and she said that I could send the materials and she would have Alice Walton to review it, and I said, Okay. I said -- I told her it was confidential, and she said, No problem, to go ahead and send the materials, and I did.

Q. Okay. And did you -- you called her?

A. Uh-huh.

Q. Do you remember what materials you sent to them?

A. Yes. I sent them a prospectus. I didn't send the documentary, but I sent the prospectus at that time.

Q. So you sent them the prospectus?

A. And the business plan, I sent to -- well, I didn't send the business plan at that time. When

[459] MR. BAKER: Okay. I just don't want it to get lost.

MR. SMITH: We won't. We haven't gotten to that conversation yet.

Q. (By Mr. Smith) Okay. So in the first conversation -- have you told me everything that was discussed in that first conversation?

MR. BAKER: With?

Q. (By Mr. Smith) With Oleta.

A. She said that -- just to send the materials and she would make sure Alice Walton reviewed them, and they would get back with me.

Q. And you sent the prospectus?

A. Uh-huh.

Q. When was the next conversation with them or Llama or Wal-Mart?

A. I never talked to Llama until she referred us in '91 to Llama.

Q. "She" is who?

A. Oleta.

Q. Okay. So who was the next one you talked to?

A. I didn't even know --

MR. BAKER: Who was the next conversation with Walton, Wal-Mart, or Llama, was his question.

[460] A. Walton Enterprises.

Q. (By Mr. Smith) Who was that with?

A. Oleta. That's the only one I talked to.

MR. BAKER: It was with Oleta?

THE WITNESS: Uh-huh.

Q. (By Mr. Smith) Okay. When was that one, the second conversation?

A. I would have to refer back to the phone bill again.

Q. Was it the same time period?

A. We talked to Oleta between '90 and '91, the July

before we sent that to Syd, several times.

Q. Okay. So this was either -- the first time you believe was in 1990?

A. Yes. I'm sure of that.

Q. And the second time was sometime before July of '91?

A. Oh, yeah. It was all before July of '91.

Q. Was it early '91? Early being in the first two months.

A. Well, see, we talked to -- Keith Crowe and I talked to her, and Keith talked to her just before we went to see Syd, and she said that she would get in touch with Syd and send our stuff to him.

Q. Okay. Let's stick with the second phone **[461]** call first for the time being. Who made that phone call, the second one?

A. I did.

Q. To Oleta?

A. Asking for Alice Walton again.

Q. Tell me about that conversation.

A. And she told me that she was sorry that she hadn't gotten back, but to please send some more. Send the documentation again. She didn't think -- you know, she didn't have it, but she had received it. She told me she had received it, but to send more. I told her that I was just checking up on it.

Q. Is that the conversation then that resulted in you sending 6B?

A. I did send that to her.

Q. So it was after that second conversation?

A. I would say approximately after the second conversation.

Q. Did you send her anything else besides the information in 6B?

A. By the way, I didn't review any documents, so I'm talking off the shoulder.

Q. Okay.

A. Okay. I sent that to her along with **[462]** another prospectus, I believe, because I didn't want -- if they didn't have it right there, I wanted to make sure they had it at their fingertips.

Q. Okay. So we've identified 6B as the other conversation. Did you have any other conversations with any of the three, Walton Enterprises, Wal-Mart, or Llama?

A. Yes.

Q. When was the next conversation?

A. Keith --

MR. BAKER: When was it?

A. In '91 we asked Keith to contact Alice Walton, because he was the marketing director at the time, and we wanted him to contact her, which he did, but he talked to Oleta also and Oleta said to go ahead and send it, and he sent

the brochure.

Q. (By Mr. Smith) Go ahead and send --

A. The brochure again, and he did.

Q. Was it 6B that we identified just a minute ago?

A. That one that I just now showed you.

Q. Okay.

A. And he did it with a letter to her.

Q. Did he send anything else; do you know?

A. I don't remember whether the prospectus **[463]** was in there or not, but I know that one was in there, and I know a letter from Keith was in there, and that one was in there.

Q. Now, this conversation that he had with Oleta at Walton Enterprises, did you hear the tape on that, or were you present when it was made, or did he just tell you about it? I'm trying to figure out how you know what was said.

A. Well, one way I know what was said is he talked to -- no. It wasn't with us that he talked to her, but he called us and faxed to us the letter that he wanted mailed, and we mailed the package to her ourselves, after he talked to her.

Q. Okay. Any other conversations with anybody at Walton?

A. She referred -- yes. We called her back after that, and she referred us over to Syd -- just checking up on it, and she said that she was going to send it over to Syd Thompson at Llama, and which she did, which we didn't know there was

a Syd Thompson.

Q. So this is the fourth phone call with Oleta that you are talking about now with Oleta?

A. Probably.

Q. Do you remember any others besides that **[464]** with Oleta?

A. There was several phone calls with Oleta, so I don't know whether it's three or four, five. It was several conversations back and forth on it.

Q. I'm trying to make sure we get the information from all of them. So the next one you remember is one where you all called her back to check on it, and she referred you to Syd?

A. Yeah. She said she was going to transfer it over and that he would be getting in touch with us, which he did.

Q. What I'm asking, though, is that the next conversation with her after the one that Keith Crowe had that you recall?

A. Uh-huh. After the package was sent, yes.

Q. And then you all called her to check up on the package?

A. No. Syd called. We called her to check up on the package, and she said she was going to send it to Syd, and then Syd called us.

Q. Now, we're still with Oleta so let's--

A. Okay.

Q. You called Oleta to check up on it. Did you call her, or did someone else call her?

A. I'm not sure whether it was me or Keith.

[467] A. Yes.

Q. What do you remember about it?

A. That Ross and he talked about the package and that he wanted him to come down there. Ross told him that he would like to present it to him, and he said, Yeah, he said, Come on down, and I believe that was on a Friday. And it was on a Tuesday, I believe, when we got there, July 23rd was when we met them, met Syd, and he said on the phone that -- Ross said, Okay, when did you want me to come? And he said, Tuesday, I think, is what he said on the phone, Tuesday. And so that's what we did.

Q. And this was -- the date again. When did you think this was?

A. Well, I know it was July 23rd, 1991.

Q Okay. Did you talk to anybody else on the telephone between that time and the time that you went to see Syd?

A. No. I mean, it was from like Friday to Tuesday.

Q. So then you went to see -- who went to see Syd the following Tuesday?

A. Ross and I and Keith.

Q. Tell me about that meeting.

[476] try to help us, and I can remember Keith turned around

and says, You don't think he will take this to the men in Texas, and I said, Well, I hope not. I said, I would hope not, because he seemed, you know, like he was interested for us.

Q. Did you have any further contact with Syd?

A. Yes.

Q. Okay. When was the next contact?

A. I talked to Syd several times, and one time he told me to call Franklin Haney.

MR. BAKER: He is talking about the next conversation you had after this meeting. What was that?

A. He asked for more documentation in August.

Q. (By Mr. Smith) In that call did you call him or did he call you?

A. I called him.

Q. Why did you call him?

A. To see what was going on, because we really thought he was going to do something for us and see if they were going to invest or what.

Q. Okay. Tell me about that conversation. What was said?

A. He asked me about Century 21, and he told me that, you know, that he had no way to research **[477]** the market was the problem. He had no way to research the market to find out whether it would be feasible for them to be able to invest or not. I said, Well, we have that documentation already, and he says, Will you please send it

to me, and that's when we sent the documentary book.

MR. SMITH: And we don't have a copy of the documentary book yet, do we?

MR. BAKER: I think that's one of these, isn't it, Theresa? Is that it?

THE WITNESS: No. The documentary book is about this thick.

MR. OLDHAM: That's part of it. This is part of it.

THE WITNESS: That's part of it, but it's not all of it.

Q. (By Mr. Smith) So 29 is part of what was in the documentary book?

A. Right. That's not all of it.

Q. Do you still have any of those, the documentary books put together somewhere, the full book put together?

A. Yes.

MR. BAKER: Yeah. I think that was one of the things we had copied and brought to you.

[483] A. No, but I didn't expect her to.

Q. Now, we have talked about, then, all the conversations you had with Walton Enterprises, right?

A. As far as I can remember at that point.

Q. Okay. And we've talked about all the conversations you had with Llama except for ones you had after you found out about APH?

A. As far as I can remember at this point.

MR. OLDHAM: She has forgotten Mary Moreland.

THE WITNESS: No, I haven't forgotten that. He hasn't said Wal-Mart, and I'm waiting for that.

Q. (By Mr. Smith) Which gets us to the next question I was going to ask. Did you ever follow through with your conversations with Dean Sanders?

A. Yes.

Q. When was that? Do you remember when the first one was?

A. It was in '91 right after we seen Syd and he hadn't done anything, and he gave me the number to Dean Sanders. And I called Dean Sanders' office, and -- I believe her name was -- Cindy answered the phone, and then she gave me Mary Moreland, which was **[484]** the assistant to Dean Sanders, and he was COO at that time of Wal-Mart.

Q. This would have been in August or September of 1991?

A. Probably.

Q. Tell me about the conversation you had with Mary Moreland.

A. We talked in depth. I told her it was confidential, and she said that he wasn't in at that time, which he -- as far as I know, he never was in when I talked to her, because I always asked for him, and he wasn't in. So anyway, she told me that I could send the documentation, and she would see he reviewed it, which I did.

Q. What did you send?

A. I sent the documentary, and the prospectus, and the little black folder.

Q. When you say "documentary," you are talking about the gray documentary book?

A. Yes.

Q. You sent a copy of that, you sent the prospectus, and you sent the black folder?

A. Yes. But the -- she also told me that she would call Syd and have Syd to send over all he had, and I guess she did.

[493] pursue other things.

Q. Did you have any other conversations or receive any other letters from anybody at Wal-Mart, Walton Enterprises, or Llama between that point and the time you found out about APH?

A. No.

Q. Have we talked about all the phone calls that you remember now and all the discussions you had with people --

A. At this time, that's all I recall.

Q. With Wal-Mart, Llama, and Walton Enterprises?

A. At this time, that's all I recall.

Q. Up until the date you find out about APH?

A. That's right.

Q. You don't remember anything else?

A. At this time, I don't.

MR. BAKER: This would be a great time to take a

break, wouldn't it?

MR. SMITH: Yeah, that's fine.

MR. BAKER: Because I need to go to the courthouse, remember?

MR. SMITH: That's fine.

(Whereupon a short break was taken.)

[513] to put it on because you haven't gotten your patents and you haven't gotten your contracts?

A. Well, it would be foolish for us to do it at this time without either having a patent finished or the contract in place that's large enough for us to do. And we spent a year, over a year, almost two years with Wal-Mart, and then we spent a year with NationsBank, plus the time we spent with Homebuilders, and those are pretty large contracts that would have existed out of those three, and that's what we needed.

Q. Has anybody with any of the defendants, Wal-Mart, Llama -- Walton is not a defendant anymore, but I will go ahead and throw them in there too -- APH, McNaughton, has anybody from any of those groups said that Wal-Mart took your system and gave it to one of the other defendants, or that Walton or Llama took your system and gave it to one of the other defendants?

A. I'm not sure exactly what you are asking me. As far as a person just saying, They took your system, or so-and-so took your system and gave it to them?

Q. Yes.

A. We have heard that said.

[514] Q. From who?

A. Yeah. We have heard that said.

MR. BAKER: You have to tell him who.

A. I wasn't -- well, I guess I did hear it too. Syd told me that they had done it at least 15 other times to him.

Q. (By Mr. Smith) But did he say that Wal-Mart took your system?

A. Yes. He said Wal-Mart had done this 15 other times, at least, to him.

Q. But did he say that he took your system?

A. Yes. He said that -- that's what he insinuated and said.

Q. But did he say it?

A. Yes. I say yes.

Q. What he said was -- what he -- according to your notes there -- said was, that this had happened 15 other times. He didn't say that they did it this time.

A. Uh-huh. But when I told him I had it and read the flyer to him, he said, They did it to me again. They have done this at least 15 other time to me too.

Q. He didn't say, They did it to me again?

A. Yes, he did.

[515] Q. Okay.

A. He was very angry.

MR. BAKER: Had anybody else said that?

Q. (By Mr. Smith) Anybody else besides Syd --

A. Yes.

Q. -- while I'm looking? Who else?

A. McNaughton said it.

Q. Okay. McNaughton is a company, but are you talking about Mr. McNaughton or Mrs. McNaughton themselves?

A. Yes.

Q. Which one?

A. Don McNaughton said it.

Q. What did he say?

A. He said that it was our system and that he was sure that they had stolen it, and also Bob Smith said it.

Q. Who is Bob Smith?

A. He is with LDDS.

Q. Who is LDDS?

A. That was a company there in Bentonville.

MR. OLDHAM: Fayetteville. Bob Smith is a contractor with Ed Harwell.

THE WITNESS: Uh-huh.

[516] Q. (By Mr. Smith) He had contracted with Ed Harwell?

A. Uh-huh.

MR. OLDHAM: He was a salesman with Ed Harwell.

Q. (By Mr. Smith) LDDS. Did McNaughton say how he knew that it was your system?

A. Well, because he saw both of them. He saw what they were both like, and he saw the documentation, and he saw what all was involved, and he said it was and that he had been duked.

Q. So the basis of his -- was from comparing the two systems?

A. And he would testify in our behalf.

Q. From comparing the two systems, is what he based it on?

MR. BAKER: Well, you're asking her to — if he said what he based it on. Don't jump in his head.

Q. (By Mr. Smith) If you know.

A. He didn't say to me what he based it on, I don't think, at this point.

Q. Okay.

A. But he did say that. He did say that it was ours.

[517] Q. What about Bob Smith? Do you know what he was basing his statement on?

A. Same thing McNaughton was.

Q. I'm asking what he told you.

A. From the documentation he had seen through APH and Ed Harwell and from the documentation he had seen from us, there wasn't any way anybody could duplicate it that close without it being the same and from what he saw and the experience through it -- being put together through APH and with Ed Harwell.

MR. BAKER: Had anybody else said it to you? I don't know if we have gotten all the names out.

MR. SMITH: Yeah, I don't know if we have either.

Q. (By Mr. Smith) Has anybody else said it to you?

A. Tom Duncan.

Q. What did he say?

MR. BAKER: Do you mean senior?

THE WITNESS: Yes.

A. He said it was our system too. We ought to win.

Q. (By Mr. Smith) We had talked before about [518] what he said to you, and you didn't say anything about him saying it was your system.

A. Well, he did.

Q. Tell me what he said.

A. He said that we would probably win if we took it to court, and we ought to take it to court.

Q. What did he say about the two systems?

A. He said it was the same thing.

Q. Well, that's what I'm asking you. What did he say?

A. He just said that it was the same thing that we had presented to him, and that if we went to Wal-Mart, then we ought to take it to court, and we ought to win.

Q. Okay. Anybody else?

A. His wife said the same thing.

Q. Whose wife?

A. Tom's wife.

MR. BAKER: Junior or senior?

A. Senior's wife.

Q. (By Mr. Smith) Had she seen the system?

A. She knows that we had it, and she knows that he came, you know, for the meeting, and we had talked. I mean, I saw her weekly and his son also.

Q. Has his wife and son seen the APH system?

[519] A. I don't think they saw it. They knew of it, and they knew about it, and they knew what it did, but his son was more involved than his wife was. His wife only talked to me about it over the phone and asked me how things were going and all, but his son knew quite a bit about it.

Q. Okay. Anybody else?

A. I think that's it.

Q. Did any of these people say that anybody at Wal-Mart or anybody with APH told them that they had taken the system?

A. No. I don't think it was put that way.

Q. Okay. So your understanding is all these people are basing it on the fact that they have seen the two systems?

A. And how they were presented to them and how they came about and the time framing they came about, and, you know, being two separate things and being shown to them and yet they were identical.

Q. Have you received any documents or letters or

memorandums or anything like that from Wal-Mart or Llama or Walton or APH that says that the system is yours?

A. No.

Q. Have you gotten anything else besides what

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

AMERICAN RELOCATION NETWORK INTERNATIONAL, INCORPORATED,	)	
Plaintiff,	)	No. 3-94-0938
vs	)	
WAL-MART STORES, INC., A.W. LLAMA CORPORATION; WALTON, ENTERPRISES II LIMITED PARTNERSHIP; AMERICA'S PARADE OF HOMES, INC., and McNAUGHTON ENTERPRISES, INC., d/b/a REAL ESTATE CENTRAL-McNAUGHTON,	)	
Defendants.		

DEPOSITION OF:
CHARLES MICHAEL CAIN
Taken on behalf of the Plaintiff
March 20, 1995

KYLE COURT REPORTING
Suite 301- 212 Third Avenue, North
P.O. Box 198056
Nashville, TN 37219
(615) 742-9209

Attached #131

FILED
U.S. DISTRICT COURT
MIDDLE DISTRICT
MAY 19, 1995
BY: D.DM
Deputy Clerk

EXCERPT FROM DEPOSITION OF:

CAIN - PAGES 25, 26, 41, 42, 43, 53-59, 68

(Attached #104)

[41] Q. Who wrote the bulletin?

A. It would have been a collaborative effort. I probably would have with some help from Jerry and maybe Brenda. I probably would have actually written them up, but then everybody would have had their input on them before anything was done.

Q. So it was circulated around to make sure everybody agreed?

A. Yes.

Q. And you believe that's the first one you put out?

A. It very well could be.

Q. Let me see it for a second. All right. Look here at --- well, let's see. First let me bring your attention to Advertising/Promotion. Read the first sentence there.

A. "Some progress has been made with Wal-Mart regarding our advertising options."

Q. Tell me what advertising options you had?

A. I don't recall what advertising options we had. What I do recall is that Wal-Mart is very particular in regard to any advertising at all that has their name in it or mentions a store location or anything related to them.

Q. What about if it had their picture?

[42] A. Anything. Anything related to them they are very particular about that. Even with school kids coming to do something, like wash cars in their parking lot. They are

going to say grace over whatever is done.

Q. So what --- were you dealing with advertising options with Wal-Mart?

A. Only to the extent that I had an opportunity to have input with the staff, the APH staff, the people who did have the direct involvement with Wal-Mart, and then I got the results of whatever was taking place and was in a position to communicate some of that back out to the field.

Q. So you said only to the extent that you had opportunities with APH staff. Who are you talking about there?

A. Jim, Joe, Ed, Jerry, Brenda.

Q. Brenda who?

A. Reynolds.

Q. Oh, okay. And who were the individuals that had direct involvement with Wal-Mart to your knowledge?

A. Jim and Joe and Ed.

Q. So when you had a plan, you took it to them and they took it to Wal-Mart?

A. Uh-huh (affirmative).

Q. What do you mean here when you say progress [43] has been made. What progress had been made when that bulletin was published?

MR. BASSHAM: I object to the form of the question. He's not APH. "You" mean you as in APH.

BY MR. BAKER:

Q. Don't worry about his objection. What progress had been made that was referred to in that bulletin?

A. I can't recall.

Q. Well, you wouldn't have put that in there if it wasn't true? You wouldn't approve it to let it go out if it weren't true?

A. I probably wouldn't have, but I still don't know what it means.

Q. Do you think Art Dixon wrote this?

A. No.

Q. What's this mean, "We now have direct involvement with their marketing committee"?

A. I don't recall what that means.

Q. What did you need Wal-Mart's marketing committee for?

A. I couldn't tell you. I wasn't involved with them.

Q. Were you involved in the effort to enter the New Orleans market?

[53] country and said something about trying the system together.

Q. Do you remember that now?

A. It seems right to me, but that means so many different things. Apparently that was a source of confusion.

Q. The video was a source of confusion?

A. The trying the system together comments.

Q. In the video?

A. In the video or anywhere else for that matter.

Q. Did you have any role in creating that video?

A. I don't recall any role in it other than maybe seeing it in the early stages.

Q. What legal entanglements were you referring to?

A. I didn't really know for sure other than if we allowed that to be used and Wal-Mart had some objections to it, then we could have a problem with Wal-Mart.

Q. That was your concern?

A. Yes.

Q. Was that Wal-Mart had an objection to it?

A. That was as far as I can --- they may have had others at the time, but I sure don't remember what they were. That would have been one, and apparently that memo indicates that Wal-Mart wasn't happy with some of **[54]** the things that were portrayed in the video, so...

Q. Is that your conclusion or is that something you know?

A. It's my conclusion from reading my own fax.

Q. Your conclusion is that Wal-Mart had an objection to that video?

A. That there were some problems with --- that Wal-Mart did not like some of those things that were portrayed in the video.

Q. Who from Wal-Mart told you that?

A. Nobody from Wal-Mart told me that.

Q. How do you know Wal-Mart objected?

A. I recall that other people within the organization who had contact with Wal-Mart had indicated that that was the case and that would be reflected.

Q. May I see that again?

A. Oh, sure.

Q. Who had objection to this?

A. (The witness shook head negatively).

Q. Who told you to put this in this letter, this paragraph?

MR. BASSHAM: Which question do you want him to answer?

MR. BAKER: Well, either one.

THE WITNESS: I couldn't tell you whether

[68] possible. It was the only way we were every going to make any money, but the situation where biscuits and gravy come out, you know, we will be able to sell enough listings in order to make enough money to pay for it and justify putting it in there, so there were a number of factors that had to play on each one.

Q. Earlier Mr. Baker asked you about an issue of linking the computers together and talked to you about what Don McNaughton and Art Dixon were interested in in that area. I just want to understand what your testimony is there.

Did Don McNaughton complain that the system wasn't linked up, and by linked here, I mean so that if you're standing in New Orleans, you could call up houses that are on the market in Phoenix. That kind of thing, ignoring the particular cities. Was that Mr. McNaughton's complains or do you know?

A. I do not recall any specific complains of that kind of linking. When people sit around and talk about the development of a project like that there are any number of ideas that come up and it's not completely outside the realm of possibility that there was some discussion of that kind of linking somewhere down the road when technology was available and money was available and the kiosks were in sufficient numbers out there to justify doing it.

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State of Delaware

FILED
U.S. DISTRICT COURT
MIDDLE DISTRICT OF PENN.
MAR 24 1995
BY _____ DEPUTY CLERK

Office of Secretary of State

I, MICHAEL RATCHFORD, SECRETARY OF STATE OF THE STATE OF DELAWARE DO HEREBY CERTIFY AMERICA'S PARADE OF HOMES, INC. IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE DATE SHOWN BELOW.

* * * * * * * * * * *

872035005

Michael Ratchford

SECRETARY OF STATE

AUTHENTICATION: *3338198

DATE: 02/04/1992

EXHIBIT 14

APPLICATION FOR CERTIFICATE OF AUTHORITY FOR Nov 25 1991

America's Parade of Homes, Inc.

To the Secretary of State of the State of Tennessee

Pursuant to the provisions of Section 48-25-102 of the Tennessee Business Corporation Act, the undersigned corporation hereby applies for a certificate of authority to transact business in the State of Tennessee, and for that purpose sets forth:

1. The name of the corporation is America's Parade of Homes, Inc.

If different, the name under which the certificate of authority is to be contained is

Feb 2 1993

[NOTE: The Secretary of State of the State of Tennessee may not issue a certificate of authority to a foreign corporation for profit if its name does not comply with the requirements of Section 48-14-101 of the Tennessee Business Corporation Act. If obtaining a certificate of authority under an assumed corporate name, an application must be filed pursuant to Section 48-14-102(d).]

2. The state or country under whose law it is incorporated is Delaware

3. The date of its incorporation is 11/19/91 (Must be month, day, and year), and the period of duration, if other than perpetual, is

4. The complete street address (including zip code) of its principal office is

726 East Main St.,	Adamsville,	TN	38310
Street	City	State/Country	Zip Code

5. The complete street address (including the county and the zip code) of its registered office in this state is

726 East Main St.,	Adamsville,	TN McNairy	38310
Street	City/State	County	Zip Code

The name of its registered agent at that office is

Joe T. Vaughn

6. The current and complete business addresses (including zip code) of its current officers are: (Attach separate sheet if necessary.)

James L. McDonough	726 East Main St., P.O. Box 893, Adamsville, TN	38310
Joe S. Bailey	726 East Main St., P.O. Box 893, Adamsville, TN	38310
Joe T. Vaughn	726 East Main St., P.O. Box 893, Adamsville, TN	38310
Larry E. Mabry	726 East Main St., P.O. Box 893, Adamsville, TN	38310

7. The names and complete business addresses (including zip code) of its current board of directors are: (Attach separate sheet if necessary.)

Ed Harwell	726 East Main St., P.O. Box 893, Adamsville, TN	38310
James L. McDonough	726 East Main St., P.O. Box 893, Adamsville, TN	38310
Joe S. Bailey	726 East Main St., P.O. Box 893, Adamsville, TN	38310
Joe T. Vaughn	726 East Main St., P.O. Box 893, Adamsville, TN	38310

8. The corporation is a corporation for profit.

9. If the document is not to be effective upon filing by the Secretary of State, the delayed effective date/time is

February 17 , 1992 (Date), (Time).

[NOTE: A delayed effective date shall not be later than the 90th day after the date this document is filed by the Secretary of State.]

[NOTE: This application must be accompanied by a certificate of existence (or a document of similar import) duly authenticated by the Secretary of State or other official having custody of corporate records in the state or country under whose law it is incorporated. The certificate shall not bear a date of more than one (1) month prior to the date the application is filed in this state.]

2/10/92
Signature Date

TREASURER
Signer's Capacity

America's Parade of Homes, Inc.
Name of Corporation

Signature

Larry E. Mabry
Name (typed or printed)

TR-4426 (Rev. 8/91)

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

AMERICAN RELOCATION NETWORK, INTERNATIONAL, INC.	) No. 3-94-0938) Judge Higgins
Plaintiff,	)
vs.	)
WAL-MART STORES, INC.,; A.W. LLAMA CORP., WALTON ENTERPRISES, INC., II, LIMITED PARTNERSHIP, AMERICA'S PARADE OF HOME, INC., McNAUGHTON ENTERPRISES, INC., d/b/a REAL ESTATE CENTRAL-McNAUGHTON,	)
Respondents.	

DEPOSITION OF CLYDE L. HIATT

Taken at Hiatt & Associates, 3931 North College Avenue, Fayetteville, Arkansas 72701 on April 4, 1995 at 4:00 p.m.

APPEARANCES

MR. W. RICHARD BAKER, JR. — FOR THE PLAINTIFF
P.O. Box 12220
Knoxville, Tennessee 37901

MR. RICHARD K. SMITH — FOR DEFENDANT WAL-MART STORES LLAMA CORP., ENTERPRISES, INC.
Parker, Lawrence, Cantrell & Dean
Fifth Floor, 200 Fourth Avenue North
Nashville, TN 37210

Also Present: Theresa and Ross Oldham

Cynthia A. Donald, R.P.R. (501) 756-2256
Certified Court Reporter
P.O. Box 1733
Springdale, Arkansas 72765-1733
(Attached #)

[39] reap part of the benefits according to you all's agreement in AIM?

A. Uh-huh.

Q. Okay.

A. I have been down to Orlando in this regard twice. Once was in October of '8 - - '92. The Florida Board of Realtors was having a state convention at the Dolphin Hotel Disney complex, and we had a display set up.

Q. Okay. "We" being AIM?

A. AIM.

Q. Okay.

A. And knowing how those trade shows go, I knew Larry would need some help, and it turned out I wasn't very much help. My back, I got spinal thosis and that's - -

Q. Spinal stenosis?

A. Spinal thosis or something to that effect.

Q. Okay.

A. And if I stand for very long, if it's being irritated and I stand very long, my legs go to sleep on me.

Q. Okay.

A. I did a lot of sitting.

Q. Okay. Did you show the trade show tapes or the brokers - -

A. I think they were on a continuous loop.

Q. Uh-huh.

A. Okay. So things went really poorly. When did AIM -

- lets

[33]

A. Yeah, get on out of here and get on down there.

Q. Did they show you any videos at that meeting?

A. I believe they did. Had a - - demonstrated a presentation tape.

Q. Okay. Is that the broker presentation or the apartment presentation one or both?

A. It may have been both.

Q. Okay.

A. But that was to take the place of Ed carrying all this stuff in. Looked like a gypsy coming in.

Q. So he took your advice in some respect, then, huh?

A. Uh-huh.

Q. The - -

A. TV group or TV production group up in Springdale did the taping.

Q. Ozark?

A. (Witness nods head yes.)

Q. Did you have any influence on what went in that tape?

A. None. In fact, it was already done before I even knew it was - -

Q. It had been made?

A. It had been made, but I didn't see it until I got to Memphis.

Q. Okay.

A. Oh, somebody else that was in the November meeting - -

[46] convention.

A. Uh-huh. I go to every one of them.

Q. Do you remember the APH system being demonstrated there?

A. Uh-huh, sure was.

Q. Did you ever do any press release in Florida?

A. No.

Q. Okay. What about - -

A. I didn't, but I think Larry did.

Q. Okay. Do you know what they were, what he did?

A. No.

Q. Is he still living down there or is he back up here?

A. He's not here.

Q. I mean - -

A. I assume that he's still in Florida. I haven't talked to him in - - I believe the last time I talked to Larry was in January to ask him what he had done to the computer that he had, - -

Q. Okay.

A. - - because it didn't work when I got back with it, and I brought it back in the box that it was shipped from Japan.

Q. Okay. What was the computer used for?

A. He kept it there in his household.

Q. Okay.

A. And what he used it for, apparently, you know, he told me he needed it, and so I as an individual bought it.

[51]

A. And that he then asked to be able to market it in Phoenix, and apparently they let him do it, and it's my understanding that Joe and Jim spent a week or so out there with him trying to get the thing off the ground out there, and it didn't fly.

Q. Okay. Did you have any discussions as to why it failed in Phoenix?

A. No. I didn't have any discussion with him as to why it failed in New Orleans.

Q. Okay.

A. Because he had bragged about how it was going on and rally going to fly and one thing and another, and, you know, if you're ever - - I wouldn't want somebody to bring it up to me to embarrass me like that, so I didn't - - I had the same consideration for him. I didn't bring it up and say "Hey, it didn't fly, did it?"

Q. Okay. So did you have any active involvement at all, then, with AIM other than maybe discussing with Larry what was going on?

A. Just over the telephone with Larry about what was going on.

Q. Okay.

A. And I intended to help work the trade show and was

not able to because of my back bothering me so bad.

Q. Okay. Okay. After - - when was that trade show held? Do you recall?

A. Yeah. It was the 29th and 30th of October of 1992. **[52]**

Q. '92? And that was in Orlando?

A. Yes, at the Dolphin Hotel.

Q. Okay. What happened after that point in time with respect to America's Parade of Homes and to Harell and all them?

A. Larry was just trying to - - you know, groping to try and find somebody because the money was fastly running out, and he just, you know, tried everything he could to get some business going, and, like I say, no business was basically ever done. It was a fiasco.